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MARCUS CORNELIUS FRONTO

II

THE CORRESPONDENCE OF
MARCUS CORNELIUS
FRONTO

WITH MARCUS AURELIUS ANTONINUS,
LUCIUS VERUS, ANTONINUS PIUS, AND
VARIOUS FRIENDS

EDITED AND FOR THE FIRST TIME TRANSLATED
INTO ENGLISH BY

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IN TWO VOLUMES

II



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THE CORRESPONDENCE OF
M. CORNELIUS FRONTO

M. CORNELII FRONTONIS

ET M. AURELII, L. VIRI, ALIORUMQUE EPISTULAE

De Feriis Alsiensibus, 1 (Naber, p. 223).

218

| MAGISTRO meo

Feris apud Alsium quam feriatis egerimus non scribam tibi, ne et ipse angaris et me obiurges, mi magister. Lorium autem regressus domulum meam <leviter> febricitantem repperi. Medicus dicit, si cito nobis me tu quoque ¹ <si tu> valeas, <ego> lietior sim. Nam oculis spero te iam utentem sanis visere . . . Vale, mi magister.

De Fer. Als. 2 (Naber, p. 223)

DOMINO meo Antonino Augusto

Ferias Alsienses in novellae quid cantetur vineae atque ² quid multarum rusticarum. Catonem quoque in oratione adversus Lepidum verbum cantari solitum commemorasse, quom ait *statuas positas Ochae atque Dionysodoro effeminatis, qui*

¹ About eight lines are lost

² In these lacunae twelve lines are lost

¹ On the Etrurian coast, twenty four miles from Rome

THE CORRESPONDENCE OF M. CORNELIUS FRONTO

MARCUS ANTONINUS TO FRONTO

162 A.D.

To my master.

In what holiday-wise we have kept our holiday at Alsium¹ I will not put on paper, that you may not be yourself troubled and scold me, my master. On my return to Lorium² I found my little lady³ slightly feverish. The doctor says, if we soon If you were well, I should be happier. For I hope to see you already enjoying the use of sound eyes Farewell, my master.

FRONTO TO MARCUS ANTONINUS

162 A.D.

To my Lord Antoninus Augustus.

Your Alsian holiday
. of many rustic things. That Cato also in his speech *Against Lepidus* mentioned a word in everyone's mouth when he spoke of statues⁴ set up to such unmanly creatures as

¹ Half way to Alsium from Rome

² Probably his daughter Cornificia

⁴ According to Plutarch, Cato preferred that statues of himself should be conspicuous by their absence

THE CORRESPONDENCE OF

magistras facerent Id in . . . velint post redire
 . . . facit Opportune . . . cantandi luden-
 dique initium capiunt. Et . . .¹ paravit.

De Fer. Als 3 (Naber, p. 224)

Ambr 217 | DOMINO meo Antonino Augusto

1. Quid? ego ignoro ea te mente Alsium isse ut
 animo morem gereres ibique ludo et ioco et otio libero
 quatrīdium universum operam dares? Nec dubito
 quin te ad ferias in secessu maritimo fruendas ita
 compararis in sole meridiano ut somno oboedires
 cubans, deinde Nigrum vocares, libros intro ferre
 iuberet, mox ut te studium legendi incessisset, aut te
 Plauto expolires aut Accio expleres aut Lucretio
 delenires aut Ennio incenderes, in horam istic²
 Musarum propriam, quintam, redires inde libris
 eres diss mitteres, Ciceronis si ser-
 mones ad te detulisset, audires; inde <de>vius
 quantum potis ad³ litus pergeres et raucis paludes
 ambires, <tum> vel, si videretur, aliquam navem
 conscenderes, ut⁴ aethere tranquillo in altum <pro-
 vectus> portisculorum et remigum visu audituque
 te oblectares; actutum inde balneas peteres, corpus
 ad sudorem uberem commoveres, | convivium deinde

Ambr 234

¹ From *opportune* to *paravit* the Codex has eleven lines
 not deciphered

² Niebuhr *istam*, Rob Ellis *istius*, & c. of Fnnius.

³ For Mai's *poteras*

⁴ Buttmann for Cod. *vel*.

Ocha and Dionysodorus who practised cooking . . .
a beginning
of singing and playing .

FRONTO TO MARCUS

162 A D

To my Lord Antoninus Augustus

I What? Am I not aware that you went to Alsium with the intention of indulging yourself and there giving yourself up to recreation and mirth and complete leisure for four whole days? And I have no doubt that you have set about enjoying the holiday at your seaside resort in this fashion after taking your usual siesta at noonday, you would call Niger¹ and bid him bring in your books, soon when you felt the inclination to read, you would polish your style with Plantus or saturate yourself with Accius or soothe yourself with Lucretius or fire yourself with Ennius, to the hour in that case appropriate to the Muses, the fifth² . . .

. . . if he had brought you treatises of Cicero, you would listen to them, then you would go as far as possible off the beaten track to the shore and slirt the croaking marshes, then even, if the fancy took you, get on board some vessel, that, putting out to sea in calm weather, you might delight yourself with the sight and sound of the rowers and their time givers³ baton, anon you would be off from there to the baths, make yourself sweat profusely,

¹ Not mentioned again. He would most likely be the secretary or librarian of Marcus possibly his anagnostes or reader

² This seems a punning reference to Quintus, the praenomen of Funus

³ The master of the rowers (something like our bosun) gave them the time by the beats of a hammer or baton

THE CORRESPONDENCE OF

regium agitare conchis omnium generum, Plautino piscatu *hariatili*, ut ille ait, et *saxatili*,¹ altibus veterum siginatum, matteis pomis bellanis crustulis vinis felicibus calicibus perlucidis sine delatoria nota.

2 Quid hoc verbi sit, quaeris fortasse accipe igitur Ut homo ego multum facundus et Senecae Annaei sectator Faustina vina de Sullae Fausti cognomento *felicia* appello, calicem vero *sine delatoria nota* quom dico, sine puncto dico Neque enim me decet, qui sim tam homo doctus, vulgi verbis Filer num vinum aut calicem acentatum appellare Nam qua te dicam gratia Alsium, maritimum et voluptarium locum, et ut ait Plautus, *locum lubricum*² delegisse, nisi ut bene haberes genio, utique verbo vetere faceres animo *volup*³ Qua, malum¹ *volup*² Immo, si dimidiatis verbis verum dicendum est, uti tu animo faceres *vigil*—vigilias dico—aut ut faceres *lalo* aut ut faceres *mole*—labores et molestias dico—Tu umquam *volup*? Volpem facilius quis tibi quam voluptatem conciliaverit. Dic, oro te, Marce, idcircone Alsium petisti, ut in prospectu maris esurires? Quid? tu Loni te fume et siti et negotiis agendis adfligere nequibas? In apopsi | iucundiores tibi esse videntur memini me ad pueros in balneis esse rescribas liber mare ipsum aiant, ubi alcedonia sint, fieri feriatum An alcedo cum pullis suis tranquillo otio

¹ Plaut. *Rud* II 1 10 ² Plaut. *Mil Glor* III 11 38

³ Plaut. *Asin* V III 1 *cp cael = caelu n gau = gaudium* (Ennius) and *vol = nolu ris* (Lucilius) *cf Pal Anthology* VI 80, and Elizabethan usage, *e g sor = sorrow*

then discuss a royal banquet with shellfish of all kinds, a Plautine *catch hook taken, rock haunting*, as he says, capons long fed fat, delicacies, fruit, sweets, confectionery, felicitous wines, translucent cups with no informer's brand

2 Perhaps you will ask what do you mean? Listen then! I as a man greatly eloquent and a disciple of Annæus Seneca call Faustin¹ wines *felicitous* wines from Faustus Sulla's title, moreover when I speak of a cup without an informer's brand, I mean a cup without a spot. For it does not become a man so learned as I am to speak in every day terms of *Falernian wine* or a *flawless cup*. For to what end can I say that you chose *Alsiu*, a seaside and pleasure resort and, as Plautus has it, a *slippery spot*, if not to indulge yourself and, in ancient parlance, take your *pleasu*? How—the mischief!—*pleasu*? Nay, if the truth must be told in docked words, that you might to your heart's content indulge in *natchin*—I mean watching—, in *labors*—I mean labours—, in *vexats*—I mean vexations. You ever indulge in *pleasu*? It were easier to reconcile you to a polecat than to pleasure. Tell me, Marcus, I beseech you, have you repared to *Alsiu* only to fast with the sea in sight? What, could you not wear yourself out at *Lorium* with hunger and thirst and doing business? With a fine view seem to you more delightful? I remember (telling) you

The very sea they say, keeps holiday, when the halcyon broods². Is a halcyon with her chicks

¹ The *ager Faustianus* was part of the *Falernian* district. *Felix* was a title of Faustus Sulla. Fronto is sarcastic in his allusion to Seneca whom he disliked.

² See Plutarch *On Hater Animals* xxxv

THE CORRESPONDENCE OF

dignior est quam tu cum tuis liberis? . . .

<v>etere<s> <tyr>annos¹

3 At enim res plane iam postulat—num studium? num laborem? num <vigiliis?> num munera?² Quis arcus perpetuo intenditur? Quae fides perpetuo substrictae sunt?³ Oculi convendo⁴ <tantum> durant, qui uno obnixi obtutu interissent

Ambr 226

Hortus qui crebro pangitur, ope <si> stercoreis | indiget, herbis et holuscula nihili procreat, frumento vero et solidis frugibus requietus ager deligitur, ubertas soli otio paratur

4 Quid maiores vestri qui rempublicam et imperium Romanum magnis auctibus auerunt. Pro avus vester summus bellator tamen lustrionibus interdum se delectavit, et praeterea potavit satis strenue. Tamen eius opera populus Romanus in triumphis mulsum saepe bibit. Avum item vestrum,⁵ doctum principem et navum et orbis terrarum non regendi tantum sed etiam perambulandi diligentem, modulorum tamen et tibicinum studio devinctum fuisse scimus, et praeterea prandiorum opimorum esorem optimum fuisse. Iam vero pater vester, divinus ille vir, providentia pudicitia frugalitate innocentia pietate sanctimonia omnes omnium principum virtutes supergressus, timen et palaestram⁶ ingressus est et limum⁷ instruxit et scurras risit

¹ These two words do not appear in Mai. Naber seems to have got them from du Rieu.

² Cod. illegible except for letter *u*.

³ Mai has *si str tac sono*.

⁴ Cornelissen for Cod. *convugio*.

⁵ Charisius (i 127) who quotes this passage, adds *duum* (*duorum*).

worthier of quiet ease than you with your children?

3 But you say that circumstances now plainly demand—not study surely? not toil? not wakefulness? not duties? What bow is for ever strung¹ what chords for ever stretched? By winking alone can eyes keep their sight, which could not but fail if fixed in one unwavering stare. A garden repeatedly planted, if it lack the aid of manure, bears only weeds and stunted vegetables of no value, for corn, however, and staple crops land that has lain fallow is chosen; rest restores fruitfulness to the soil.

4 What of your ancestors who enlarged the state and empire of Rome with huge additions? Your great grandfather, consummate warrior as he was, yet at times took pleasure in actors² and, moreover, drank pretty stoutly. Yet thanks to him the Roman people often drank mead at his triumphs. We know, too, that your grandfather, a learned ruler and a strenuous, loving not only to govern the world, but to go up and down in it, was yet devoted to music and flute players, and was withal a right good eater of right rich banquets. Again, your father, that godlike man, who in his foresight, continence, frugality, blamelessness, dutifulness, and personal righteousness excelled the virtues of all rulers, yet visited the palaestra, and baited a hook and laughed at buffoons.

¹ Hor. *Od.* II. x. 20

² So *Princ. Hist.* ad fin.

³ Galen, vi. 406 (Kuhn) says the same of Marcus.

⁴ The margin of Col. has *theatru* twice and implies that it was another reading. *Capit. Vit. Pii* xi. 2 says Pius was fond of fishing.

THE CORRESPONDENCE OF

Ambr 225

5 Nihil de Gaio Caesare dico acerrimo Cleopatrae hoste <post moeche>,¹ nihil de Augusto Liviae viro Romulum ipsum urbis huius conditorem, quom hostium ducem manu comminus conserta obtruncavit quomque spolia opima | Feretrio vexit, huncne tenui victu usum putas? Profecto neque esuriens quisquam neque abstemius animum induxisset virgines adultas de spectaculis rapere Quid? Num senex sanctissimus nonne inter liba et decimas profanandas et suovetaurilia mactanda aetatem egit, epularum² dictator, cenarum libitor, feriarum promulgator? Saturatum et feriatum dico E<x o>mn<ibus tu>³ esuriales ferias celebras? Nec Chrysippum tuum praeteribo, quem cotidie ferunt madescere solitum Et pleraque Socratem <plane ipsum ex> Socraticorum *Symposus* et *Dialogis* et *Epistulis* existimes hominem multum scitum et facetum fuisse—Socratem intelleges Aspasiae discipulum, Alcibiadi magistrum

6 Iam si bellum indixit ludo otio satietati voluptati, at tu dormi saltem, quantum libero homini satis est Intensus ad supremam ad luminis²⁴ An tandem si ignem de caelo nemo sur-

¹ From the margin of Cod

² Niebuhr *epulonum* for Cod *epulorum* Cicero (*De Orat* iii 19) says that the Epulones were instituted by the Pontifices

³ So Brahm i
Auntie

⁴ Query *hor*
adventum pro

stolen fire from heaven, would not the sun suffice you for your judicial duties? Do realise in your conscience that you are tied to a daily falsehood, for, when you say that you "appoint the day" for trial of cases and yet try by night,¹ then you are bound to be untruthful, whether you condemn or acquit. If you condemn anyone, you say, *there appears to have been gross negligence*, where indeed but for the lights nothing could appear at all.

7 But do, I beseech you, in jest or earnest let yourself be persuaded by me not to rob yourself of sleep, and to keep the boundaries of day and night distinct. Imagine that two noble and illustrious litigants, Evening and Morning, are having a law suit about boundaries not yet marked out. Each party puts in a description of his own frontier. Sleep claims to intervene in their trial, for he too is connected with the business, and declares that he suffers prejudice. Would that I had as much vigour and enthusiasm as I enjoyed when long ago I composed those trifles in praise of *Smoke* and of *Dust*. Verily I would have written a eulogy of Sleep to the top of my skill! Now, too, if you care to hear a short apologue on Sleep, listen.

8 They tell us that Father Jove, when at the beginning of things he was founding the human race, with one stroke cleave asunder the continuity of man's life into two parts in every respect equal: the one he clothed with light, the other with darkness, called this day and that night, and assigned to night rest and to day work. As yet Sleep had not been born, and all men passed their whole lives awake.

¹ D O lxxi 6 § 1 (of Marcus) reads *horis die & nocte*.

THE CORRESPONDENCE OF

Ambr 219 sed quies nocturna vigilantibus pro somno adhuc¹ |
 erat promulgata Paulatim deinde, ut sunt ingenia
 hominum inquieti et agitandi et turbandi cupida,
 noctes diesque negotiis exercebant, horum otio
 nullam impertiebant Tum Iovem ferunt, ubi im-
 iurgia et vidimonia nocturna sisti et noctes quoque
 compendinari videret,² cum corde suo agitasse de
 suis germanis fratribus unum praeficere, qui nocti
 atque otio hominum curaret Neptunum multas et
 graves curas maritimas cruciatum, ne fluctus terras
 totas cum montibus obruerent neve motu³ venti
 cuncta funditus percellerent, silvas et sata radicitus
 haurirent, Ditem quoque Pitrem cruciatum multa
 opera multaque cura templa infera⁴ aegre coer-
 ceri, amnibus et paludibus et stagnis Stygus
 Acheruntem aegre commoeri, canem denique eus-
 todem apposuisse umbris territandis quae aufugere
 ad superos cuperent, eique cani trinas latrandi
 fauces ac trinos hiatus trinasque dentium formidines
 addidisse

Ambr 214 9 Tum Iovem deos alios percontatum animadver-
 tisse, gratiam vigilare aliquantum pollere, Iunonem
 plerosque partus nocturnos ciere, Minervam artium
 atque artificum magistram | multum vigiliari velle,
 Martem nocturnas eruptiones et insidias muta re
 iuvare, Venerem vero et Liberum multo maxime

¹ This word is doubtful

² Heindorf for Cod. *videat*.

But in lieu of sleep the hush of night had been hitherto established for wakeful men. Then, little by little, men's disposition being restless and prone to action and excitement, they began to employ nights as well as days in business, giving not an hour to rest. Then they say that Jove, seeing that now quarrels and recognizances were fixed for the night, and suits were even put off from one night to another, took counsel with his own heart to set up one of his own brethren to preside over night and the repose of mankind. But Neptune pleaded his many heavy cares upon the seas, that the waves should not overflow whole lands, mountains and all, or cyclones in their fury level everything with the ground and suck up the woods and the crops by their roots. Father Dis too made his plea that hardly with immense pains and immense anxiety were the nether precincts kept under control, hardly was Hades impaled in on every side with rivers and marishes and the Stygian fens, that he had even set up a watch dog to terrify any Shades that had a mind to escape to the upper air, and had given him to boot a triple throat for barking, three gaping jaws and threefold terror of teeth.

9 Then Jove after question had with other Gods perceived that a liking for wakefulness was considerably in the ascendant, that Juno called most children to birth at night, that Minerva, mistress of arts and artificers, was for much wakefulness, that Mars by the silence of the surroundings aided nightly sallies and ambuscades, that Venus, however, and Liber were by

³ Hauler (*Vers d Phil* 41, p 79) reads *coorta*.

⁴ Lucr vi 141

THE CORRESPONDENCE OF

pernoctantibus favere. Capiti tum consilium Iuppiter Somni procreandi eumque in decem numerum adsciscit, nocti et otio praesentat eique claves oculorum tradit. Herbarum quoque sucos, quibus corda hominum Somnus sopiret, suis Iuppiter manibus temperavit: securitatis et voluptatis herbae de caeli nemore advectae, de Acheruntis autem pratis leti herba petita. Tunc leti guttam unam aspersit sed¹ minimam, quanta dissimulantis lacrima esse solet.

Hoc, inquit, suco soporem hominibus per oculorum repagula inriga: cuncti quibus inrigaris ilico post procumbent et artubus mortuis immobiles iacebunt. Tum tu ne timeto, nam tuent et paulo post, ubi exigilaverint, exsurgent.

10 Post id Iuppiter alas non ut Mercurio talaria sed ut Amori humeris exaptas Somno adnexuit. *Non enim te soleis, ait, et² talari ornatu ad pupulas hominum et palpebras incurrere oportet <aut>³ curruli strepitu et cum fremitu equestri, sed placide et clementer pinnis teneris in modum hirundinum advolare nec ut columbae alis plaudere.*

11 Ad hoc, quo iucundior hominibus Somnus esset, donat ei multa somnia amoena ut, quo studio quisque devinctus esset, aut⁴ histrionem in somnus fautor spectaret, aut tibicinem audiret, aut aurigae agitantis⁵ monstraret, milites somnio vincerent, imperatores somnio triumpharent, peregri-

¹ For Cod *aspersisse* Brakman would supply *ferunt*.

² Bahrens for Cod *aut* ³ Heindorf

⁴ For Cod *ut*, and so in the two following cases

⁵ For Cod *agitandi* Pearce (cp Suet *Vitell* 17) suggests *ministraret*

far the most in favour of the night wakers Jupiter then made up his mind to beget Sleep, and enrolled him among the Gods, set him in charge of night and repose, and gave into his keeping the keys of men's eyes. He also mixed with his own hands the juice of herbs, wherewith Sleep might soothe to rest the hearts of men. The herbs of security and delight he culled from the groves of Heaven, but the herb of death was sought in the meadows of Acheron. Of that death he mingled but one drop and that the tiniest, as is the tear of one who would hide his tears.

With this juice, said he, instil slumber into men through the gateways of their eyes all, into whom thou dost thus instil it, will thereafter at once fall down and lie prone with limbs motionless as though dead. But fear thou not, for they will be alive and anon, when they awake, will rise again.

10 That done, Jupiter furnished Sleep with wings, not as Mercury's attached to the ankles, but like Love's fitted to the shoulders. *For thou must not, said he, dash into the eyelids and pupils of men with sandals and winged ankles, with the whirling of chariots and the thunder of steeds, but fly to them quietly and softly with gentle wings like a swallow and not with clapping of pinions like pigeons.*

11 Furthermore, that Sleep might be the more welcome to men, he endowed him with many a lovely dream that, according to each sleeper's favourite hobby, he might—in his dreams—either watch an actor and clap him or listen to a flute player or shout advice to a charioteer in his course, that soldiers might conquer and generals triumph¹—in

¹ *cp* Lucan, *Phars* vii 7 ff.

THE CORRESPONDENCE OF

nantes somnio redirent Ea somnia plerumque ad verum convertunt

12 Igitur, Marce, si quo tibi somnio hinc opus est, censeo libens dormias tantisper dum quod cupis quaque exoptas vigilant tibi optingat.

De Fer Als 4 (Naber, p 230).

MAGISTRO meo salutem

Modo recepi epistolam tuam, qua confestim fruar Nunc enim imminebant officia *δισπαράγῃς* Interim quod cupis, mi magister, breviter ut occupatus parvulam nuntio nostram melius valere et intra cubiculum discurrere

Dictatis his legi litteras Alsienses meo tempore, mi magister, quom alii cenarent, ego cubarem tenui cibo contentus hora noctis secunda—multum, inquis, cohortatione mea <commotus> ¹ Multum, mi magister, nam verbis tuis adquevi saepiusque legam ut saepius adquiescam Ceterum verecundia | officii, quam sit res imperiosa, quis te magis norit? Sed oro te, illud quid est, quod in fine epistolae manum condoluisse ¹ dicis? Illatenus dolueris, mi magister, si me compotem voti di boni faciunt Vale mi magister optime, *φιλόστοργε* ² *ἄνθρωπε*

Ambr 149
Quint xl.
ends

¹ Naber for Cod *consoluisse*

² See i p 280 Lit "man of warm affections"

M CORNELLIUS FRONTO

their dreams, and wanderers come home—in their dreams. Such dreams generally turn out true.

12 So, Marcus, if you need a dream hereafter, I advise you to sleep with a will, until such time as what you desire and as you wish it may fall to your lot in your waking hours.

MARCUS ANTONINUS TO FRONTO

162 A D

To my master, greeting

I have just received your letter, which I will enjoy presently. For at the moment I have duties hanging over me that can hardly be begged off. Meanwhile I will tell you, my master, shortly, as I am busy, what you want to hear, that our little daughter¹ is better and can run about the bedroom.

After dictating the above I read the Albian letters, my master, at my leisure, while the others were dining and I was lying down at eight o'clock, satisfied with a light repast. *Much good has my advice done you*, you will say¹. Much, my master, for I have rested² upon your advice, and I shall read it the oftener that I may the oftener rest upon it. But who knows better than yourself how exacting a thing is obedience to duty? But what I beseech you is that which you say at the close of your letter, that your hand pained you. If the Gods are kind, my master, and grant my prayers, you will not have suffered pain since. Farewell, my best of masters, man of the warm heart.

¹ Probably Cornificia

² A play on the word

THE CORRESPONDENCE OF

(Naber, p. 217)

DE BELLO PARTHICO

<Ad Antoninum Imperatorem>

Ambr 236,
following
244

1 . . . <qui deus tan>¹, tam genuit gentem
Romanam, aequo animo patitur fatisci nos interdum
et pelli et vulnerari An cunctetur de militibus
nostris Mars Pater illa ducere?—

*Ego quom genui, lum morituros scui et ei rei sustuli,
Praeterea, quom in Ieriae orbem misi ob defendendum
imperium,*

*Scibam me in mortifera bella non in epulas mittere**

Haec verba Telamo Iroino bello de suis liberis
semel elocutus est, Mars de Romanis saepe mul-
tisque in bellis hoc carmine usus est Gallico bello
apud Alliam, Samniti apud Caudium, Punico ad
Cannas, Hispanico apud Numantiam, Iugurthino
apud Cirtam, Parthico ad Carrhas Sed semper et
ubique aerumnis adores terroresque nostros trium-
phis commutavit.

2 Sed ne nimis vetera alte petam, vestrae familiae
exemplis utar Traiani proavi vestri ductu aus-
picioque nonne in Dacia captus vir consularis?

¹ Heindorf

² From Ennius's tragedy *Telamon* quoted also by Cic
Tusc iii 13 Fronto adapts the words of Ennius which
are *ad Troiam qu in misi ob defendendam Graeciam* He also
has *mortiferum bellum*

M CORNELIUS FRONTO

ON THE PARTHIAN WAR¹

162 A D

To the Emperor Antoninus

1 The God who begat the great Roman race has no compunction in suffering us to faint at times and be defeated and wounded Or would Father Mars hesitate to say of our soldiers the words?—

*Full well I knew when I begot you, you would die
I reared you for that end,
Aye, when I sent you forth the wide world through the
empire to defend,
Full well I knew to deadly wars and not to feasts my
children I should send*

These words were uttered by Telamon to his sons once in the Trojan war But Mars has spoken of the Romans in the same strain many a time and in many a war in the Gaulish war at Allia,² in the Samnite at Caudium,³ in the Punic at Cannae,⁴ in the Spanish at Numantia,⁵ in the Jugurthine at Cirta,⁶ in the Parthian at Carrhae⁷ But always and everywhere he turned our sorrows into successes and our terrors into triumphs

2 But not to hark back too far into ancient times, I will take instances from your own family Was not a consular taken prisoner in Dacia under the leadership and auspices of your great grandfather

¹ The Parthian war broke out soon after the death of Pius. Fronto is consoling Marcus for a disaster in Armenia when Severianus the legatus and his legion were destroyed at Flegria in 162 by the Parthians. See also *Princ. Hist. ad fin.* ² July 16 390 B.C.

³ 321 B.C.

⁴ Aug. 2, 216 B.C.

⁵ 139 B.C.

⁶ Apparently the defeat of Allia in 109 B.C. is meant.

⁷ 52 B.C.

THE CORRESPONDENCE OF

Nonne a Parthis consularis aeque vir in Mesopotamia trucidatus? Quid? avo vestro Hadriano imperium optinente quantum militum ab Iudaeis, quantum ab Britannis caesum Patre etiam vestro imperante, qui omnium principum <feliciissimus erat>¹

Ambr 235
followed by
231 and 232

| Si Marso quis patre natus viperas lacertas et natrices timeret, nonne degenerasse videretur?²
pruculis diebus in fascis tenentur, illi in pannis degunt omnem aetatem³

Ambr 238

3 Itaque bonus ille imperator venire captivos jubebat sint ingratus Quid ego, quippe cui Piscibus in caudis est <virtus>,⁴ avibus in pennis, anguibus serpendi vi quod quis | et gloriam Romani nominis restituen- dam et insidias fraudesque hostium <puniendas>, quae comparati vendere nugaci con- sulta sunt tam<en> iure meritoque

Ambr 247

neque | vocent paratos progredi remanere, porro retro, illic <istic>⁵ Haudquaquam utile est homini nato res prosperas perpetuo evenire fortunae variae magis tutae

4 Et <magnis firmatus> opibus et omnium quae cumque intenderat sine offensione potitus, <Polycrates>⁶ nihil in aetate agunda duri aut acerbi

¹ Niebuhr, but perhaps *pacatissimus* A lacuna follows of not less, as it seems than a page

² From the margin of Codex

³ From margin of p 232 of Codex.

⁴ Or possibly *rob or* ⁵ Mai

⁶ Heindorf, who also suggests *redigisset* below The other long insertions are my own merely to make a readable translation possible They mostly differ from Naber's Such in locations as there are in the Codex have been followed

Τραϊανὸς? ¹ Was not a consular likewise slain by the Parthians in Mesopotamia? ² Again under the rule of your grandfather Hadrian what a number of soldiers were killed by the Jews, ³ what a number by the Britons ⁴ Even in the principate of your Father, who was the most fortunate of princes

Should we not think the son of a Marsian ⁵ father degenerate, if he were afraid of vipers, lizards, and water-snakes? ⁶ are kept a few days in swaddling bands, the others pass their whole lives in rags

3 And so that excellent emperor ⁷ bide his captives be sold The strength of fishes lies in their tails, of birds in their wings, of snakes in their power of crawling

both the restoration of the prestige of the Roman name, and the punishment of the enemy's traps and treachery,

call upon those to halt who are ready to advance, forward, backward, here, there It is by no means advantageous to a man that is born of woman that prosperity should always attend him changing fortunes are more secure

4 Take Polycrates ⁸ strong in his vast wealth, and successful without a stumble in all that he undertook, he is said in the course of his life to have experienced no hard fortune or disappointment,

¹ Longinus, see Dio lxxviii 12

² Maximus, see *ibid* lxxviii 30, and below, *Princ Hist ad fin* ³ See Dio, lxxix 14

⁴ Not recorded elsewhere, but see Spart *Vit Hadr* 5

⁵ The Marsians were supposed to have power over snakes see Pliny, *A H* vii 2, xxv 5

⁶ In this gap (Amlr 231) there was a reference to the Parthians as we see from a marginal note

⁷ Trajan (?) ⁸ Tyrant of Samos, who died 522 B.C.

expertus esse dicitur, quin sub manus quom cuncta <redegisset> prorsus <haberetur omnium regum> bertissimus <Cui, ut fertur,> rex Amasis Aegyptius sapiens fortuna de eximia¹ consultus, scriptis familiaribus litteris sursit semet² ipsum voluntario aliquo damno sciens multaret eoque dolore <deis invidis se conciliaret> . . . <ille autem aureo> habebat <in> anulo manupretio summo³ facie eximia lapidem smaragdum, <quam prae ceteris suis bonis rebus . . . aestimabit> Tum Polycrates anulum nave longa in altum provectus sponte in mare abiecit, unde numquam postilla emergeret.

5 Tum quod sciens sponteque <fecit>⁴ ibiectum lapidem dolebat. <Sed mox grandem> piscator <piscem retibus> saepe <iactis tandem> nactus, indignum duxit ad venales deferre, sed dignitati parens regi obtulit Rex gratum acceptumque habuit | s<ibique> apponi iussit quo iusso piscique opera <data> se<rvu> contrectantes <eum> anulum in alvo repertum ad regem gaudentes detulerunt Tum Polycrates litteras ordine de casu et postliminio anuli perscriptis ad regem Amasim mittit Amasis magnum et maturum malum Polycrati coniectans amicitiam hospitiumque renuntiat, ut alieno potius, suo quam hospiti aut amico fortunam commutatam ipse minus aegre ferret.

¹ Cod *fortunatissimi* : Heindorf reads *fortunae peritissimus*

² Mai Brakman says the Codex has *s i per* (?)

³ In the Codex follows *smaragdum*. ⁴ Brakman

such as to prevent him, when he had brought everything under his power, being counted the most fortunate of all kings. To him, as the story goes, Amasis the wise King of Egypt, being consulted about his unique good fortune, wrote a friendly letter, advising him of his own accord to inflict some loss knowingly upon himself, and by that penance disarm the envy of the Gods . . . Now he had an emerald of extraordinary lustre set in a gold ring of the finest workmanship, which he valued above all his other possessions. Polycrates putting out to sea in a ship of war, cast this ring of his own accord into the water, making sure that he should never afterwards see it again.

5. Deliberate and premeditated as his act had been, he subsequently regretted the jewel he had cast away. But shortly after a fisherman, who with repeated casting of his nets had at length caught a huge fish, thought it too fine to take to the dealers, and in virtue of its excellence presented it to the king. The king was much pleased with the gift, and ordered it to be served at his own table. When the slaves in pursuance of this order were busy with the fish preparing it for the table, they found the ring in its stomach and brought it joyfully to the king. Then Polycrates sent King Amasis a letter with full particulars of the sacrifice and recovery of the ring. Whereon Amasis, forecasting for Polycrates a disaster signal and speedy, renounced all friendship and ties of hospitality with him, that when his fortune changed he might regard it with less concern as affecting a stranger rather than his own guest or friend.

THE CORRESPONDENCE OF

6 Sed somnium filiae Polyerati iam ante insigne optigerat. Patrem suum videre sibi visa erat apertum atque edito loco sublimem unguis et Iovi Iovis et Solis manibus. Haruoli autem Ietam et pinguem fortunam portendi eo¹ somnio interpretati. Sed omne contra eventum. Nam deceptus ab Oroete Perse Polyerates captusque in crucem sublatus est. Ita ei cruciati somnium expeditum. Manibus <enim Iovis quom plueret lavabatur, unguebatur Solis, dum ipse e corpore humorem emitteret>² Huuscemodi³ exorsus <felices ha>bent <exitum> interdum <infaustum>. Non est exultandum nimia et diutina prosperitate, | nec si quid malae pugnae acciderit defetiscendum. Sed victoriam brevi sperari, namque semper in rebus gestis Romanis crebrae fortunarum commutationes extiterunt.

7 Quis ita ignarus est bellicarum memoriarum, qui ignoret populum Romanum non minus cadendo quam caedendo imperium peperisse? legiones nostris saepe <fusas fugi>⁴tasque armis barbarorum esse? Quamvis in<festi et>⁵ truces tauri subigi iungendo domuique potuerunt aequae ac⁶ nostri exercitus olim⁷ sub iugum missi sunt. Sed eosdem illos, qui sub iugum egerant, paulo post ante triumphum nostri egere et captivos sub corona vendere.

¹ For Cod *portendit*

² Chiefly from Mai

³ Mai *huius [fabulae]*, Mähly *unusque modi*

⁴ Alan ⁵ Brakman

⁶ For *potuerit*, praequa n

⁷ For Cod *sili*, Naber *illi*

6 But the daughter of Polycrates had previously had a remarkable dream. She had seemed to see her father, raised aloft on an open and conspicuous spot, being laved and anointed by the hands of Jupiter and the Sun. The diviners read the dream as foretelling a rich and happy fortune¹. But it turned out wholly otherwise. For Polycrates, beguiled by Oroetes the Persian, was seized and crucified. And so the dream was fulfilled in his crucifixion. For he was laved by Jove's hands when it rained, and anointed by the hands of the Sun, when the dew of agony came out upon his skin. Such prosperous beginnings as his have not seldom a disastrous ending. There should be no exultation over excessive and prolonged prosperity, no fainting away when a reverse has been sustained. You may soon hope for a victory, for Rome in her history has ever experienced frequent alternations of fortune.

7 Who is so unversed in military annals as not to know that the Roman people have earned their empire by falling no less than by felling? that our legions have often been broken and routed by the arms of barbarians? It has been found possible to subject to the yoke and to tame bulls, however savage and dangerous, and in the same way our armies have in former times been made to pass under the yoke. But those very foes, who forced us under the yoke, have our generals but a little later forced to march at the head of their triumphs and have sold them as slaves by auction.

¹ Periander the tyrant of Corinth had a similar dream and Artemidorus (a writer of the time of Marcus) *On Dreams* 4, said it signified great honours and riches.

THE CORRESPONDENCE OF

8 Post Cannensem cladem Poenus imperator anulorum aureorum, quos caesis equitibus Romanis Poeni detraxerant, tres modios cumulos misit Carthaginem Sed non multo post Carthago capta est illis, qui anulos detraxerant, catenae inditae sunt In ea pugna Scipio quantum hominum Poenorum Afiorumque cepit aut occidit aut in deditionem accepit! Si eorum linguas resecari imperasset, navem onustam linguis Romam inegisset

Ambr 216

9 Quod te vix quicquam nisi *raptum* et *furtum* legere posse prae curis praesentibus scripsisti, fac memineris et cum animo tuo cogites C Caesarem atrocissimo bello Gallico cum alia multa militaria tum etiam duos *De Analogia* libros scrupulosissimos scripsisse, inter tela volantia de nominibus declinandis, de verborum aspirationibus et rationibus inter classica et tubas Cur igitur tu, Marce, non minore ingenio praeditus quam C Caesar, nec minus ordine insignis nec paucioribus exemplis aut documentis familiaribus instructus, non vincas negotia et invenias tibi met tempora, non modo ad orationes et poemata et historias et praecepta sapientum legenda sed etiam syllogismos, si perpeti potes, resolvendos?

¹ He quotes Marcus's own phrase (see above 41 *Anto* li 1) in the letter from Minturnae (probably) where Marcus was trying to get a little respite from the anxieties caused by the Partian invasion of Roman provinces and the disaster at Flegrea.

8 After the disaster at Cannae the Carthaginian general sent to Carthage three bushels of golden rings heaped up, which Carthaginians had drawn from the fingers of Roman knights slain in the battle. But not many years later Carthage was taken, and chains were put on those who had drawn off the rings. In that battle what a multitude of Carthaginians and Africans did Scipio capture or slay or reduce to submission¹. Had he given orders for their tongues to be cut out, he could have sent into Rome a ship freighted with the tongues of his enemies.

9 With respect to what you say that you can scarcely read anything except *by snatches* and *by stealth*¹ in your present anxieties, recall to your mind and ponder the fact that Gaius Caesar, while engaged in a most formidable war in Gaul wrote besides many other military works two books of the most meticulous character *On Analogy*,² discussing amid flying darts the declension of nouns, and the aspiration of words and their classification mid the blare of bugles and trumpets. Why then, O Marcus, should not you, who are endowed with no less abilities than Gaius Caesar, and are as noble in station and fortified by no fewer examples and patterns at home, master your duties and find time for yourself not only for reading speeches and poems and histories and the doctrines of philosophers but also for unravelling syllogisms, if you can endure so far.

¹ Cicero quotes this work (*Brutus* 72) as meaning *De ratione Latine loquendi*. Caesar wrote it while crossing the Alps on his way from his winter quarters at Luca, in north Italy, to the seat of war in Gaul.

THE CORRESPONDENCE OF

10 Nunc, ut orationem istam M. Tulli, quam tibi legendam misi, praeis commendem. Mihi profecto ita videtur, neminem umquam neque Romana neque Graecorum lingua facundius in contione populi laudatum quam Marcus Pompeius in ista oratione laudatus est, ut mihi ille videatur non ita suis virtutibus ut Ciceronis laudibus *Magnus* nominatus.¹ Tum praeterea multa istuc reperies praesentibus consiliis tuis capita apte considerata, de ducibus exercituum diligendis, de commodis sociorum, tutela provinciarum, disciplina militum², quibus artibus praeditos esse oporteat imperatores belli et cetera gerentes³ tractatus quos intentionem consuevi. Ne velim qui ego intento maiore vel aliquando re praesentatas has res arbitror profuturas. Velis dum taxat. Et si quis quod⁴ Neque mihi succenseas, quod non mea manu tibi rescripserim, praesertim quom a te tua manu scriptas litteras acceperim. Digitis admodum invalidis nunc utor et detractantibus, tum haec epistula multorum verborum indigebat,⁵ mea autem dextera manus hac tempestate praeicarum litterarum

Ad Antoninum Imp. 11 (Naber, p. 94)

Vat 83 ed
init

[MAGISTRO meo

Bonum annum, bonam salutem, bonam fortunam peto a deis die mihi sollemni natali tuo, com

¹ *Ac non patius* is apparently the reading of the Codex according to d. i. Rien. The margin of Cod. has *cognominatus*.

² Buttmann for Cod. *de* tum. Brahmman prefers *de fende d. s. tum* for *disciplina militum*.

³ Brahmman

⁴ Twenty six lines are lost

M. CORNELIUS FRONTO

10. Now to say a few words in praise of that speech¹ of M. Tullius which I sent you to read. It seems to me the very truth that no one was ever praised either in Greek or Latin before an assembly of the people more eloquently than Gnaeus Pompeius in that speech, so much so that to me he seems to have earned his title of *Great* not so much by reason of his own merits as of Cicero's praises. Then besides you will find in it many chapters full of reflections well suited to your present measures, touching the choice of generals, the interests of allies, the safeguarding of provinces, the discipline of soldiers, the necessary qualifications of commanders for duties in the field and elsewhere

.
because I think that these considerations, even occasionally brought forward with greater earnestness, would be profitable. At all events you would wish it; and if anyone Do not be offended with me for not having answered your letter in my own hand, and that though the letter I had from you was in yours. My fingers just now are very weak and refractory; then this epistle required many words, but my right hand is at this moment one of few letters.

MARCUS ANTONINUS THE EMPEROR TO FRONTO

162 A.D.

To my master.

A good year, good health, good fortune do I ask of the Gods on this your birthday, a red-letter

¹ Surely the *Pro Lege Manilia*; but Mai refers it to a speech on the Mithridatic War.

² Buttm. for *Coel. ingerebat*. Perhaps *reuerſum* *reuerſum* . . . *ingerebat* would stand.

THE CORRESPONDENCE OF

potemque me voti fore confido, nam quem sponte dei iuvisse volunt et dignum ope sua iudicant, eum commendo benignitati eorum. Tu quom alia laetabilia, mi magister, in tuo animo festo hoc die agitabis, numerato apud te qui te valde diligant in us primis hunc tuum discipulum ponito, mihi Dominum meum fratrem, *ταβα φιλοῦντάς σε ἀνθρώπους*. Vale, et perennem multis annis bonam valetudinem, mi magister, optine laetissimus in columitate filiae nepotum generi.

Nostra Faustina reficit sanitatem. Pullus noster Antoninus aliquo lenius tussit. Quantum quisque in nidulo nostro iam sapit, tantum pro te precatur. Iterum atque iterum ac | poiro in longum senectam bene vale, iucundissime magister. Peto a te—sed impetratum sit—ne te ob diem natalem Cornificiae Lorum vexes. Dis volentibus Romae paucis diebus nos videbis. Sed post diem natalem tuum, si me amas, nox quae sequitur iam placide quiescas sine ullius instantis officii cogitatione. Hoc Antonino tuo da sollicite et vere petenti.

Ad Antoninum Imp. 1 2 (Naber, p. 94)

ANTONINO AUGUSTO FRONTO

I Seni huic et, ut tu appellas, magistro tuo bona salus bonus annus bona fortuna res omnis

¹ Hor. *Od.* IV xi 17

² Victorinus, who married Gratia about 160

day¹ for me, and I am assured that they will grant my prayer, for I commend to their bounty him whom the Gods themselves delight to aid and deem worthy of their help. You, my master, when other joyous thoughts pass through your mind on this your festal day, count over to yourself those who dearly love you: among the chief of these set this your pupil, set the Lord my brother there, both of us men that love you passionately. Farewell, my master, and may you for many years to come enjoy unbroken good health with your daughter, grandchildren and son-in-law² spared to make your happiness complete.

Our Faustina is recovering her health. Our little chick Antoninus³ coughs rather less. The occupants of our little nest, each as far as he is old enough to do so, offer prayers for you. Next year and the year after and right on into a long old age, most delightful of masters, may you have the best of good health. I ask of you—and do not refuse me—not to take the trying journey to Lorium for Cornificia's⁴ birthday. God willing, you shall see us at Rome a few days hence. But if you love me, pass the coming night in peace and quiet without attending to any business however pressing. Grant this to your Antoninus, who asks it with sincerity and concern.

162 A.D.

FRONTO to Antoninus Augustus.

1. For this old man and, as you style him, your master, good health, a good year, good fortune,

¹ Antoninus (Geminus) and Lucius Aurelius Commodus, afterward emperor, were born on Aug. 31, 161. The former died four years later.

² The daughter of Marcus

THE CORRESPONDENCE OF

bona, quae tu scribis eo¹ te mihi ab deis die tibi sollemniissimo natali meo precatum, omnia mihi ista in te tuoque fratre sita sunt, Antonine meo cordi dulcissime quos ego postquam cognovi meque vobis transdidi, nihil umquam prae vobis dulcius habui neque habere possum, tametsi alios annos totidem de integro, quantum² viui, viuiam Hoc igitur unum coniunctis precibus ab deis precemur, uti vos in columes et florentes et reipublicae familiaeque vestrae prospere potentes aetatem longam degatis Nec quicquam est praeterea, quod ego tanto opere vel ab deis vel a forte fortuna vel a nobis ipsis impetratum cupiam, quam ut vestro conspectu et adfatu vestrisque tam iucundis litteris frui quam mihi diutissime liceat, eique ego rei, si fieri posset, repuerascere opto

2 Nam quod ad ceteras res alioqui adtinet, sit vitae est. Video te, Antonine, Principem tam egregium quam speravi, tam iustum tam innocentem quam spondidi, tam gratum populo Romano et acceptum quam optavi, tam mei amantem quam ego volui, tam disertum quam ipse voluisti Nam ubi primum coepisti rursum velle, nil offuit interdum noluisse Fieri etiam vos cotidie facundiores video

¹ Cod ea

² Query quot iam.

¹ So Melito in his *Apology* (Eus *H E* iv 26, § 7) calls him *ευκταος*

everything good, which you write you have prayed of the Gods for me on this my birthday, above all others a red letter day for you—all these good things are in your keeping and your brother's, O Antoninus, sweetest joy of my heart: whom, since I have known you and given myself up to you, I have ever held sweeter than all things, and will so hold you, although I live again other years as many as I have lived. This one thing, therefore, let all of us with joint prayers ask of the Gods, that you may both pass long lives in health and vigour, exercising your power to the advantage of the state and of your own households. Nor is there aught else I could wish so much to obtain either from the Gods or from Fairy Fortune or from yourselves, as that it may be my lot as long as possible to enjoy your presence, your converse, and your delightful letters, and to that end I am ready, if it were possible, to be a boy again.

2 Otherwise, as far as everything else is concerned, I have had my fill of life. I see you, Antoninus, as excellent an Emperor as I hoped, as just, as blameless as I guaranteed, as dear and as welcome¹ to the Roman People as I desired, fond of me to the height of my wishes, and eloquent to the height of your own. For now that you once begin to feel the wish again, to have lost the wish for a time proves to have been no set back.² Indeed I see both of you becoming more eloquent

¹ About the year 146 Marcus devoted himself more exclusively to philosophy and neglected rhetoric (see *Ad Mar* iv 13, l. p 216). Later he eschewed it entirely, see *Thoughts*, i 7; i 17, § 4. But there was rhetoric in his writings, and Dio, lxxi. 35, § 1, says he was "practised in rhetoric."

THE CORRESPONDENCE OF

et exulto quasi adhuc magister Nam quom omnes
virtutes vestras diligam et amplectar, fateor tamen
præcipuum me et proprium gaudium ex eloquentia
vestra capere Itidem ut parentes, quom in vultu
liberum oris sui lineamenta dinoscunt, ita ego quom
in orationibus vestris vestigia nostrae sectae anim
adverto—*γεγηθε δὲ φρενα Ἀητω* meis enim verbis
exprimere vim gaudii mei nequeo Nec te recor
datio ista urgeat nec omnino angat, quod tibi con
scious es non perpetuam operam eloquentiae dedisse
Nam ita | res habet qui magno ingenio praeditus
recta via ad eloquentiam ab principio inductus atque
institutus fuerit, tametsi interdum concessarit aut
restiterit, ubi primum progredi denuo et pergere
visum erit, coeptum illud iter confecerit setius for
tasse aliquo, minus tamen nihilo Crede autem hoc
mihi, omnium, quos ego cognoverim, uberiore quam
tu sis ingenio adfectum comperisse me neminem
quod quidem ego magna cum lite Victorini nostri et
magna eius cum bile adiurare solebam, quom cum
adspirare ad pulchritudinem ingenii tui posse ne
garem Tum ille meus Rusticus Romanus, qui
vitam suam pro unguicula tuo libenter dederit
atque devoverit, de ingenio tamen invitus et tristis
aegre concedebat.

¹ Hor. *Od.* vi 106 = Verg. *Aen.* i 502

² About this time Consul II and *praef. urbi.* For Marcus

every day, and I am elated as if I were still your master. For while I love and cherish all your merits, yet I confess that I derive my chief and peculiar pleasure from your eloquence. Just as it is with parents, when in their children's faces they discern their own lineaments, so it is with me when in the speeches of either of you I detect marks of my school—and *glad in her heart was Latona* ¹ for I cannot express in my own words the intensity of my joy. And do not feel compunction at the recollection, or be vexed in the least with the consciousness, of not having devoted yourself continuously to eloquence. For the fact is that, if a man endowed with great natural capacity has been from the first brought into and trained in the right way of eloquence, although he have given it the go by for a time or rested on his oars, as soon as ever he resolves to make a fresh start and set forward, he will get to the end of his journey somewhat less quickly of course, but less successfully not a whit. But believe me when I say that, of all the men whom I have ever known, I have never met with any one gifted with richer ability than yourself. I used, indeed, to affirm this with an oath to the immense disagreement of our dear Victorinus and his immense disgust, when I said that he could not aspire to the charm of your natural gift. Then that friend of mine, the Roman Rusticus² who would gladly surrender and sacrifice his life for your little finger, yet on the question of your natural ability gave way against his will and with a frown.

relations with him see *Thoughts* i 17, §§ 4-6. Soon after this letter was written he condemned Justin Martyr and his companions to death as Christians.

THE CORRESPONDENCE OF

Vol. 82

maxime florere quæ didicisti atque adolescere videntur. An parum animadvertis, quanto studio quantoque favore et voluptate dicentem te audiat senatus [populusque Romanus? Et spondeo, quanto saepius audierit, tanto flagrantius amabit, ita multa et grata sunt ingenui et oris et vocis et facundie tue delibamenta. Nimirum quisquam superiorum imperatorum—imperatoribus enim te comparare malo, ne viventibus compararem¹—quisquam illorum hisfigurationibus uteretur, quæ Greci σχήματα vocant? Ne longius repetam, vel proximo senatu quomodo Cyzicenorum gravem causam commemorares, ita orationem tuam figurasti—quam figuram Greci παραλείψιν appellant—ut prætereundo tamen diceres et dicendo tamen præterires. In qua² multa simul laudanda sunt: primum hoc, te doctissime per spexisse sociorum graves aerumnas non perpetua neque recta aut proluxa oratione exaggerandas, indicandas tamen impensius, ut digni senatus misericordia et auxilio viderentur, deinde ita breviter rem omnem atque ita valide elocutus es, ut paucissimis verbis omnia quæ res posceret, continerentur, ut non ocius aut vehementius terra urbem illam quam

¹ Mai for Cod *compararem*

² For Cod *quo*

¹ These are the technical figures of rhetoric whether of language, such as alliteration antithesis, etc., or of thought such as παραλείψιν (= a passing by) here

that now more than ever is blossoming all that you have learnt and growing to maturity. Or do you fail to notice the eagerness, partiality, and pleasure with which the Senate and the Roman People listen to your speeches? And I go bail for it, the oftener they listen the more passionately will they love, so many and so ingratiating are the charms of your genius, your countenance, your voice, and your eloquence. In fact, is there one among former Emperors—I prefer to compare you with Emperors that I may not compare you with contemporaries—is there one who used these rhetorical figures which the Greeks call *σχήματα*?¹ Not to go further back, even at the last sitting of the Senate, when you spoke of the serious case of the Cyzicenes, you embellished your speech with a figure, which the Greeks call *παράλειψις*, in such a way that while waiving a point you yet mentioned it, and while mentioning it you yet waived it. In this speech many things at once call for praise—the first, that you most judiciously grasped the fact that the heavy trials of the allies should not be made too prominent by a continuous or direct or lengthy speech upon them, but should at the same time be pointed out with earnestness, so as to seem worthy of the compassion and help of the Senate, then you set forth the whole case so briefly, and yet so forcibly, that all that the subject demanded was summed up in the fewest words, so that not more suddenly or more violently was the city stirred by the earthquake² than the minds of

¹ The earthquake at Cyzicus is apparently alluded to again in the *De Elague* *lib. 1 ad fin.* It has a bearing on the date of the disputed *Letter to the Commune of Asia* relative to the Christians (I useb. *H. E.* iv. 13; Justin, *Apol. 1 ad fin.*).

THE CORRESPONDENCE OF

Vat. 81

animos audientium tua oratio mouerit. Ecquid ad
gnosceis formam sententiae tullianae— | *ut non ocu-
aut vehementius terra urbem illam quam animos audien-
tium tua oratio mouerit?* Ut quisque amore quempiam
deperit, eius etiam naeuolos sauiatur

5 Sed mihi crede amplissimum te iam tenere in
eloquentia locum, breuique summum eius cacumen
aditutum, locuturumque inde nobiscum de loco supe-
riore, nec tantulo superiore, quanto rostra foro et
comitio excelsiora sunt, sed quanto altiores antennae
sunt prora vel potius carina. Praecipue autem gau-
deo te uerba non obuia adipere, sed optima quae-
rere. Hoc enim distat summus orator a mediocribus
quod ceteri facile contenti sunt uerbis bonis, summus
orator non est bonis contentus, si sint meliora.

6 Sed haec certo loco ac tempore pluribus vel
scribemus ad te vel coram colloquemur. Ut
uoluisti, Domine, et ut uoletudo mea postulabat,
domi mansi, tibi que sum precatus ut multos dies
natales liberorum tuorum prospere celebres. Pullo
nostro tussiculam sedierit et dies clementior et
nutrix eius, si cibis aptioribus uescatur, omnia enim
remedia atque omnes medelae fovendi¹ infantium
faucibus | in lacte sunt sitae

Vat. 10

7 In oratione tua Cyzicena quom deos precaveris
et si fas est, obsecro addidisti quod ego me non

¹ m¹ of the Codex has *offendi*. Novák would read *off* + *sis*

² Adjoining the Forum. It was where the Romans voted
by Curiae. ³ He is referring to Cornificia's birthday

⁴ i. e. Antoninus Geminus, see last letter

your hearers by your speech. Do you recognize the Ciceronian turn of the sentence²—*so that not more suddenly or more violently was the city stirred by the earthquake than the minds of your hearers by your speech*. When a man is deeply in love he kisses even the moles on his beloved's cheek.

5 But believe me you now hold a most distinguished place in eloquence and will ere long reach its very summit, and speak thence with us from higher ground, and not so much higher only as the Rostrum is than the Forum and the Comitium,¹ but as much as the yards overtop the prow or rather the keel. But above all am I glad that you do not snatch up the first words that occur to you, but seek out the best. For this is the distinction between a first rate orator and ordinary ones, that the others are readily content with good words, while the first rate orator is not content with words merely good if better are to be obtained.

6 But I will either write to you or discuss these matters orally with you more fully at some fixed time and place. As you wished, my Lord, and as my health demanded, I have stayed at home and prayed for you that you might keep many happy returns of your children's birthdays.² The greater mildness of the weather and his nurse if he takes more suitable food, will have quieted our little chick's³ cough, for all remedies and all curatives for throat affections in children are centred in milk.⁴

7 In your Cyzicus speech, when invoking the Gods, you added *and if it be alloned, I adjure them*, a use of the word⁵ which I do not remember to have

¹ See Aul. Gell. xii. 1.

² Plautus uses it (*lud.* III. iii. 39) of supplication to Venus and Festus defines it as *open a sacris petere*.

THE CORRESPONDENCE OF

mihi legisse Obsecrari enim et resecrari populus aut iudices solebant. Sed me forsitan memoria fugerit tu diligentius animadvertito

8 Me quoque tussicula vexit et manus dexteræ dolor, mediocris quidem sed qui a rescribenda longiore epistula impedierit dictavi igitur

9 Quoniam mentio παραλείψεως habita est, non omittam quin te impertiam quod de figura ista studiosius animadverterim, neque Graecorum oratorum neque Romanorum, quos ego legerim, elegantius hac figura usum quemquam quam M Porcium in ea oratione, quæ de *Sumptu suo* inscribitur, in qua sic ait

Iussi caudicem proferri, ubi mea oratio scripta erat de ea re, quod sponsionem feceram cum M Cornelio Tabulae prolatae maiorum benefacta perlecta deinde quæ ego pro republica fecissem leguntur Ubi id utrumque perlectum est, deinde scriptum erat in oratione "Numquam ego pecuniam neque meam neque sociorum per ambitionem dilargitus sum" "Atque, noli noli scribere,"¹ inquam "istud, nolunt | audire Deinde recitavit" "Numquam"² ego praefectos per sociorum vestrorum oppida imposui, qui eorum bona <coniuges>³ liberos diriperent "Istud quoque dele, nolunt audire recita porro" "Numquam ego praedam neque quod de hostibus captum esset neque manubias inter pauculos amicos meos divisi, ut illis eriperem qui cepissent" "Istuc quoque dele nihil eo"⁴ minus volunt dici, non opus est recitato" "Numquam ego electionem darii quo amici mei per symbolos pecunias magnas caperent

¹ Query recitare

² Fekstein

³ For Cod num q1 os

⁴ Alan for Cod nihilo

read, for it was the people or a jury that used to be adjured or conjured, but perhaps my memory plays me false do you think over it more carefully yourself

8 I, too, am troubled with a cough, and pain in my right hand, not very severe it is true, but enough to prevent my *writing* so long a letter: therefore I have dictated it

9 Since mention has been made of *paraleipsis*, I must not fail to acquaint you with what I have noticed with regard to this figure in a somewhat careful search None of the Greek or Roman orators that I have read has used this figure more happily than M Porcius in that speech which is entitled *On his Expenses*,¹ in which he says as follows

I ordered the volume to be produced containing my speech on the subject of my having made an agreement with M Cornelius The tablets were produced the services of my ancestors were read out then was recited what I had done for the state The reading out of both these being finished, the speech went on as follows "I have never either scattered my own money or that of the allies broadcast to gain popularity" "Oh, don't, don't, I say, record that they have no wish to hear it" Then he read on. "Never have I set up officials in the towns of your allies to rob them of their goods, their wives, and the children" "Erase that too, they will not listen: go on reading" "I have never divided booty or spoil taken from the enemy or prize money among my select friends so as to rob those who had won it" "Erase as far as that too: they would rather hear anything than that, there is no need to read it" "I have never granted a pass to travel post, to enable my friends to gain large

¹ Nothing more is known of this speech

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"Perge istuc quoque uti cum maxime dolere" "Numquam ego argentum pro viro congiario inter apparitores atque amicos meos disidi neque eos malo publico divites feci" "Enimvero uique istuc ad lignum dele" Vides in quo loco respublica sit, ubi¹ quod reipublicae bene fecissem, unde gratiam capiebam, nunc idem illud memorare non audeo ne invidiae sit. Ita inductum est male facere impoene, bene facere non impoene licere.

10 Haec forma παραλήψεως nova, nec ab ullo alio, quod ego sciam, usurpata est. Iubet enim legi tabulas, et quod lectum sit iubet praeteriri. A te quoque novum factum, quod principium orationis tuae figura ista exorsus es; sicut multa alia nova et eximia facturum te in orationibus tuis certum habeo, ita egregio ingenio natus es.

Ad Verum (I) Imp. l. 1 (Naber, p. 113).

Vat. 2 (some where)

| <Dovino meo>²

1

Vat. I

Sit quod iubes rectum fortasse sed serum neque enim omnia, quae ratio postulat, etiam aetas tolerat An tu cyenum coges in ultima cantione cornicum vuculas aemulari² . . | . . <in>genio discrepanti iuberessne me niti contra naturam adverso quod aiant flumine? Quid, si quis postularet, ut

¹ Haupt for Cod uti

² For all the first part of this letter see Hauler, *Mittel d. long deutsch archaol Institut*, xix pp 317-321, and *Archiv f lat Lexicographie*, xv 106

³ These two sentences are from the margin of Codex

sums by these warrants" "Be quick, erase as far as that too most particularly"¹ "I have never shared the money for mine largess between my retinue and friends, nor enriched them to the detriment of the state" "Marry, erase as far as that down to the wood" Pray mark the pass to which the state has come, when I dare not now mention the very services I have done it, whereby I hoped to gain gratitude, lest it should bring odium upon me So much has it become the fashion that a man may do ill with impunity, but not with impunity do well

10 This form of *paraleipsis* is original and, as far as I know, not employed by anyone else For Cato bids the tablets be read, and what is read he bids be waived aside You also have shewn originality by beginning your speech with this figure, just as you will, I am sure, do many other original and brilliant things in your speeches, so great is your natural ability

FRONTO TO MARCUS ANTONINUS (?)²

To my Lord

? 162 A D

1
What you enjoin may perhaps be right, but it is too late nor indeed does age also permit all that reason demands Would you make a swan in its dying song rival the cawing of crows? . . . though it is out of keeping with my genius, would you advise me to strive against nature and swim, as they say, against the stream? What, if one called on

¹ Or, "as quickly as possible"

² The heading and title to this letter are lost, and its attribution is not certain It reads like a letter to Marcus Naber, following Mai, assigns it to Verus.

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Phidias ludicra aut Canachus deum simulacra fingeret? aut ut Calamis lepturga¹ aut Polycleetus chirurgus?² Quid, si Parrhasium versicolora pingere iuberet aut Apellen unicolori, ut Nealcen magnifica aut Protogenen minuta, aut Niciam obscura ut Dionysium industria, aut lascivia Euphranorem aut Pausiam t<ristiti>a sa<tura>?³

2 In poetis autem quis ignorat ut gracilis sit Lucilius, Albucius⁴ aridus, sublimis Lucretius mediocris Pacuvius, inaequalis Accius, Ennius multiformis? Historiam quoque scripsere Sallustius structe Pictor incondite, Claudius lepide Antias in venuste, Sisenna longinque, verbis Cato multumbris Caelius singulis Contionatur autem Cato infeste, Gracchus turbulente, Tullius copiose Iam in iudiciis saevit idem Cato, triumphat Cicero, tumultuatur Gracchus, Calvus rixatur

3 Sed haec exempla fortasse contemnas Quid? philosophi ipsi nonne diverso genere orationis usi sunt? Zeno ad docendum plenissimus, Socrates ad coarguendum captiosissimus, Diogenes ad | exprobandum promptissimus, Heraclitus obscurus involvere omnia, Pythagoras mirificus clandestinis signis sancire omnia, Clitomachus anceps in dubium vocare omnia Quidnam igitur ageient isti ipsi sapientis

¹ Or m³ *leptirgata* for m¹ *Turena*

² m³ *Est sca ep duriora et Tis can eis proxima* of the works of Callon Quint xii 10 7 ³ Or *sa<illa>* Hauser

⁴ Minton Warren *Abuccius* from Varro, *R F* iii 6 6

Phidias to produce sportive works or Canachus images of Gods, or Calamis delicate statuary or Polycletus rough handiwork? What if one bide Parrhasius paint rainbow hues or Apelles monochromes, or Nearches grand canvasses or Protogenes miniature¹ ones, or Nicars sombre pictures or Dionysius brilliant ones, or Euphranor subjects all licence or Pausias all austerity?

2 Among poets, who does not know how Lucilius is graceful,² Albucius dry, Lucretius sublime, Pacuvius mediocre, Accius unequal, Ennius many-sided? History, too, has been written by Sallust symmetrically by Pictor without method, by Claudius pleasantly by Antias without charm, by Sisenna³ at length, by Cato with many words abreast by Caelius with words in single harness⁴. In harangue, again, Cato is savage, Gracchus violent, Tully copious, while at the bar Cato rages, Cicero triumphs, Gracchus riots, Calvus quarrels.

3 But perhaps you would make light of these instances. What? have not philosophers themselves used different styles in their speaking? No one could be fuller in exposition than Zeno, more captious in argument than Socrates, more ready than Diogenes at denunciation. Heraclitus was obscure enough to mystify everything, Pythagoras wonderfully prone to give everything religious sanction with secret symbols, Chitomachus agnostic enough to call everything in question. What, pray, would your wisest of

¹ Hauser says this refers to detailed work and not to size.

² Aul. Gell. vii. 14, defines *gracilis* of style as combining *venustus* and *subtilitas* (= Greek *λεγρός*), and says Varro attributed *gracilitas* to Lucilius.

³ As the names go in pairs, the contrast to Sisenna must have dropped out, and *longinque* may belong to his *vis-a-vis*.

⁴ For Cato's trick of using *atque*. *atque* see i. p. 152.

THE CORRESPONDENCE OF

simi viri, si de suo quisque more atque instituto deducerentur? Socrates ne coargueret, Zeno ne disceptaret, Diogenes ne increparet, ne quid Pythagoras sanciret, ne quid Heraclitus absconderet, ne quid Clitomachus ambigeret?

4. Sed ne in prima ista parte diutius quam epistulae modus postulat commoremur, tempus est de verbis primum quid censeas considerare. Dic sodes hoc mihi, utrumne, tametsi sine ullo labore ac studio meo verba mihi elegantiora ultro occurrerent, spernenda censes ac repudianda? An cum labore quidem et studio investigare verba elegantia prohibes, eadem vero, si ultro si iniussu atque invocatu meo venerint, ut Menelaum ad epulas, tu idem¹ recipi iubes? Nam istud quidem vetare durum prorsus atque inhumanum est: consimile ut si ab hospite, qui te Falerno accipiat, quod rure eius natum domi superfiat, Cretense postules vel Sa|guntinum, quod—malum!—foris quaerendum sibi atque mercandum sit. Quid Epictetus incuriosus Socrates Xenophon Antisthenes Aeschines Plato² Haud igitur indicarent ea si³ Quid nostra memoria Euphrates, Dio, Timocrates, Athenodotus? Quid horum magister Musonius? Nonne summa facundia praediti neque

¹ Rob. Ellis for Cod *quidem*.

² Eleven lines are missing. The names are from the margin. ³ Nine lines are lost.

¹ Hom. *Il.* ii. 408.

² A Stoic philosopher friend of Pliny the younger. He committed suicide under Hadrian.

men themselves do, if called away from their own individual habits and principles—Socrates from argu-

from calling anything in question?

4 But that we may not dwell on this first part longer than is compatible with the compass of a letter, it is time to consider first what is your view about words. Tell me then, pray, whether in your opinion the choicest words must be disdained and rejected, even if they come to me of their own accord, without any toil and pursuit of mine? or, while forbidding the searching out of choice words with toil and eagerness, do you at the same time bid me receive them like Menelaus at the banquet,¹ if only they come of their own accord, unbidden by me and uninvited? For to forbid that indeed is downright harsh and barbarous. It is as though from a host who welcomes you with Falernian wine, which being produced on his own estate is abundant at home, you should call for Cretan or Saguntine, to be got—bad cess to it!—from elsewhere and paid for. What . . . Epictetus unconcerned . . . Socrates . . . Xenophon . . . Antisthenes . . . Aeschines . . . Plato . . . Would they then not indicate this, if . . . What in our own recollection of Euphrates,² Dio,³ Timocrates, Atherodotus?⁴ What of their master Musonius?⁵ Were they not gifted with a supreme command of words, and

¹ Of Prusa called "Golden mouthed," orator and philosopher. He died about 117.

² Fronto's master.

³ A Stoic philosopher under Nero and Vespasian.

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minus sapientiae quam eloquentiae gloria incliti extiterunt?

5 An tu <censes Epictetum non> consulto verbis usum fuisse?¹ ne pallium quidem sordibus obsitum candido et pure lauto prietulisset Nisi forte Epictetum² arbitrare eludum quoque consulto factum et servum consulto natum Quid igitur est? Iam facile ille numquam voluntarias verborum sordes induisset Iorte et servus, consulto natus est sapiens Sed ita eloquentia caruit pedum incolumitate³

(Naber, p 139)

DE ELOQUENTIA 1

<ANTONINO AUGUSTO FRONTO>

1⁴ | verborum loca gradus pondera aetates dignitatesque dinoscere ne in oratione praepostera ut in temulento ac perturbato convivio conlocentur, quae ratio sit verba geminandi et interdum trigeminandi, nonnumquam quadruplicia, saepe quinques ut eo amplius superlata ponendi, ne frustra neve temere verborum strues acerventur, sed ut certo ac sollerti termino uniantur⁵

2 Post ista omnia investigata examinata distincta finita cognita, verborum omnium, ut ita dixerim, de⁶

1 .

2

3

Codex. Possibly the previous clause *for e* etc is not complete

⁴ A column seems to be lost between the end of the last letter and the beginning of this As Naber points out the order of the various fragments in this mutilated tractate cannot be certainly determined.

famed as much for their eloquence as for their wisdom?¹

5 Or do you think that Epictetus did not use words of set purpose? . . . would have preferred even a mantle foul with dirt to one that was white and spotlessly clean. Unless you think perchance that Epictetus became lame too of set purpose and of set purpose was born a slave. What then is it? So easily he . . . never would have donned voluntary rags of words. Even a slave by accident he was of set purpose born a wise man. But so eloquence was divorced from soundness of feet² . . .

ON ELOQUENCE 1

FRONTO to Antoninus Augustus

p 162 A D

1 . . . to distinguish between the place, rank, weight, age, and dignity of words, that they may not be put together absurdly in a speech, as it might be in a drunken and confused crouse, on what principles words are to be doubled and sometimes trebled, on occasion drawn up four deep, often carried to a fifth place³ or even extended further than that; that words be not heaped to no purpose or at random but be combined within fixed and intelligent limits

2 When all these have been examined, tested, distinguished, defined, and understood, then from

¹ All this was surely addressed to Marcus and not Verus.

² Epictetus, it is said, was made lame by the cruelty of his master, Epaphroditus.

³ See for an illustration the first two lines of § 2, and *cp* last letter, § 2, *verba multum*.

* Schüler *refers* *framingur*.

* From the margin.

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populo, sicut in bello ubi opus sit legionem conscribere, non tantum voluntarios legimus sed etiam latentes militari aetate conquirimus, ita ubi verborum praesidius opus sit, non voluntarius tantum, quae ultro obvenerint, utemur sed latentia eliciemus atque ad imperandum indagabimus

3 Hic illud etiam, ut arbitror, scite a nobis commentandum,¹ quibus rationibus verba quaerantur, ut non luantes oscitantesque expectemus, quando verbum ultro in linguam quasi palladium de caelo defluat;² sed ut regiones verborum et saltus noverimus ut, ubi quæsitis opus siet,³ per viam potius ad investigandum quam invio progredimur

4 Certa igitur loca sunt a vobis <exploranda>⁴
 Ambros 403 | . . In primis oratori cavendum ne quod novum verbum ut aes adulterinum percutiat, ut unum et id verbum vetustate noscatur et novitate delectet⁵ castella verborum conciliabula verborum⁶

Ambros 402 | Officiorum genera duo, rationes

¹ Heindorf for Cod *conventum* Schafer would read *commentum* ² From the margin of Cod for *diffultat* in the text

³ For Cod *sit ut* the phrase is from Plautus

⁴ Heindorf ⁵ From the margin of Codex

⁶ These two phrases are separate marginal glosses on the left margin of p 403

¹ The *palladium* was a supposed image of Pallas that fell from the sky at Troy and was carried off by the Greeks

² In this mutilated passage Fronto is speaking of *apertitia* and *eloquentia* in connexion with a classification of human functions. The *officia* or essential functions of man are, he says, of two *genera*, and can be classified under three heads (*rationes* or *species*). The distinction of the two *genera* is not

the whole word population, so to speak, just as in war, when a legion has to be enrolled, we not only collect the volunteers but also search out the skulkers of military age, so when there is need of word reinforcements, we must not only make use of the voluntary recruits that offer themselves, but fetch out the skulkers and hunt them up for service

3 At this point too, as I think, we must seek skilfully to find out the methods by which words are sought for, that we may not wait gaping open-mouthed till such time as a word shall fall of itself upon our tongues like a god send¹ from heaven, but that we should know their haunts and their coverts, so that, when we have need of choice words, we may follow them up along a beaten track rather than have no path to help us forward

4 You must therefore scout over definite ground First of all a speaker must be on his guard against coming a new word² like debased bronze, so that each several word may be both known by its age and delight by its freshness fortresses of words assembly-places of words Of obligations² the

given in what we have The three classes are (1) that of existence that a man must exist and perform certain *munera*, e.g. eat, in order to live (2) of quality, he must be such and such and have such and such habits and idiosyncrasies, (3) of objective or result the two previous *officia* enabling him to discharge the third This third class is concerned wholly with *negotia*, work done, and is self contained Under this comes *sapientia* Since a man must live before he can be wise, a *munus*, like eating, is an *officium* of the wise man, though it has no direct connexion with his *negotium*, which is wisdom Eating belongs to *species prima*, which is common to all men, but wisdom to *species tertia* The pursuit of eloquence comes under *species secunda*, which varies with every man.

¹ See I 219, II 115

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tripertitae Prima species substantivae, ut sit, alteri
qualitatis, ut talis sit; tertia rei, ut rem ipsam,¹
cuius causa superiora officia susceperit, expleat

Ambr 401 <dis>cedendae exercendaeque sapientiae
tertiam autem hanc speciem rei dico ac negotium
solum terminatum, se quasi contentum Hac officiorum
partitione, si tamen aut ille verum aiebat
aut ego olim audita memoria retineo, ut prima
homini ad sapientiam tendenti sint molimenta quae
ad vitam salutemque pertinent conservandam Igitur
et prandere et haurire et ungui et cetera eiusmodi
munera sunt sapientis officia, quumquum neque in
baineis quisquam sapientia <se haurit>, neque ut
circu<li . . . quom> ad mensam cenant prandio<que comeso>² vomerit, sapientiam ructant
<nec vitam quidem potes habere nisi> si ederis, <nec
sapientiam> nisi viveris Quid igitur istic admonendus
es? Ne tu <negotium> hoc <sapientiae in>³
prandio et mensa situm existimes Non est sapientiae
negotium vesci sed sine vita, quae cibo constat,
nulla sapientia, studia nulla esse possunt Nunc
Ambr 406 . . . vides igitur <prima haec> officia <omnium
esse hominum>⁴ . . . | at non aequae
sequentia officia, quae sunt qualitati cuiusque ac

¹ For Cod. *re ipsa* Niebuhr

² *Cod.* so is from the margin of Codex

³ Heindorf

⁴ The additions are by Heindorf. There are seven lines of the Codex from *nunc* to *hominum*.

kinds are two, the categories three fold The first class, of existence, that a man be, the second, of quality, that he be such and such, the third, of objective, that he satisfy the very object by reason of which he undertook the foregoing obligations . . . of learning and practising wisdom by this third class, however, I mean that of objective and that which has its end in the work to be done and is, as it were, content with itself By this division of obligations, if indeed either he¹ said what was true, or I carry correctly in my memory things heard long ago, for a man who aspires to wisdom those would count as the first things to be taken in hand which have to do with the preservation of life and health So dining and bathing and anointing with oil and all functions of such a kind are obligations of the wise man And yet neither at the baths can anyone lave himself with wisdom, nor when he has dined at table with a select company, and after the meal had occasion to vomit, will he bring up wisdom, but you can neither have life unless you eat, nor wisdom unless you live What then is the warning here? that you should not think this business of wisdom to lie in dining and the pleasures of the table The business of wisdom is not to eat but apart from life, which is derived from food, there can be no wisdom and no pursuits Now . . . you see then that these primary obligations apply to all men . . . but the second class of obligations which are suited to the character of each person, cannot be in the

¹ Probably one of Fronto's teachers i.e. Dionysius or Athenolotus who must have been mentioned in a lost part of the letter

THE CORRESPONDENCE OF

commodata,¹ possunt omnium esse communia.² Aliud prandium gubernatori commune³ et aliud pugili de integris tergoribus; aliud prandendi tempus, alia lavatio, alius somnus, alia pervigilio

5 Considera igitur an in hac secunda ratione officiorum contineatur eloquentiae studium Nam Caesarum est in senatu quae eie sunt suadere, populum de plerisque negotiis in concione appellare, iustum corrige, per orbem terrae litteras mittere, reges exterarum gentium compellere, sociorum culpas edictis coercere, benefacta laudare, seditiosos compescere, feroces terrire Omnia ista profecto verbis sunt ac litteris agenda Non excoles igitur id quod tibi totiens tantisque in rebus videas magno usui futurum? An nihil referre arbitraris qualibus verbis agas, quae non nisi verbis agi possunt? Erras si putas pari auctoritate in senatu fore Thersitae verbis expromptam sententiam et Menelai aut Ulixi orationem, quorum Homerus et voltus in agendo et habitus et status et voces canoras ac modulationum eloquentiae genera diversa non <dedignatus est describere> | . . .

6 Quisquam vereri potest quem iridet? quis quum dicto oboediret cuius verba contempserit Quom in officina Apellis Alexander Magnus de picturae arte dissereret, *Tace quae nescis*, inquit, ne

¹ The margin of Cod has *secunda species qualitatis haec est*

² The margin adds *sed diversa sunt et quae communia omnibus*, which Heinlorf thinks should be *neque communia omnibus*.

³ Heinlorf *commodum*.

same way common to all. One kind of dinner is usual for the man at the wheel, and another off the whole chine of an ox for the prize fighter, their times of dining are different, their washing is different, their sleeping, their keeping awake different.

5 Consider then whether in this second category of obligations be contained the pursuit of eloquence. For it falls to a Cæsar to carry by persuasion necessary measures in the Senate, to address the people in a harangue on many important matters, to correct the inequities of the law, to despatch rescripts throughout the world, to take foreign kings to task, to repress by edicts disorders among the allies, to praise their services, to crush the rebellious and to cow the proud. All these must assuredly be done by speech and writing. Will you not then cultivate an art, which you see must be of great use to you so often and in matters of such moment? Or do you imagine that it makes no difference with what words you bring about what can only be brought about by words? You are mistaken if you think that an opinion blurted out in the Senate in the language of Thersites would carry equal weight with a speech of Menelaus or Ulysses, whose looks in the act of speaking and their mien and attitude and melodious voices and the difference of cadence in their oratory Homer did not in fact disdain to describe¹ . . .

* * *
6 Can anyone fear him whom he laughs at, or could anyone obey his order, whose words he despised? When Alexander the Great was discussing the art of painting in the studio of Apelles, *Hold your tongue*, said the painter, *about what you*

¹ Hom. II. iii. 212.

THE CORRESPONDENCE OF

*te pueri illi qui purpurissum sublerunt, contemnunt*¹
 Nemo tanta auctoritate est, qui non, ubi
 peritit deficitur, ab eo qui peritior est, despiciatur
 mudebor temnor mersit².

Ambr 824 7 Tibi tanta eloquentia parata est, quae ad laudem
 etiam supersit comi | sese nil, ac
 Ambr 823 capillus etsi non cotidie acu ornandus, tamen pectine
 cotidie expediendus est | fuisse Croesum et
 Solonem, Periandrum et Polycraten, Alcibiaden
 denique et Socraten

8 Quis dubitat sapientem ab insipiente vel prae-
 cipue consilio et delectu rerum et opinione discerni?
 ut, si sit optio atque electio divitiarum atque eges-
 tatis, quamquam utrique et malitia et virtute
 careant, tamen electionem laude et culpa non carere
 Proprium namque sapientis officium est recte eligere,
 neque perperam vel postponere vel anteferre

9 Si me interrogas concupiscimne bonam vale-
 tudinem, abnuam equidem, si sim philosophus nihil
 est enim fis concupiscere sapienti aut adpetere
 quod fors fuit in frustra concupiscat, nec quidquam
 quod in manu fortunae situm videat concupiscet
 Tamen, si necessario sit alterutra³ res eligenda
 Achilli potius perniciem eligam quam debilitatem
 Philoctetae Simile igitur in eloquentia servandum
 non opere nimio concupiscas igitur, nec opere nimio

¹ This whole passage has been restored from the Codex by
 Hauser *Hien Stud* 35 pp 398 f For the curl er part
 Mai read : *r de t us q i a n dictorum eius ea sa haud* the last
 three words being doubtful

² These isolated words are from the margin of Cod
 (Naber) ³ Brakman for Cod *altera*.

*don't understand, that those boys yonder who are mixing the purple paint may not despise you*¹ There is no one, however authoritative, who when his skill is at fault is not looked down upon by him who has greater skill

7. You have achieved such great eloquence as is even more than enough for fame and hair, though it need not be duly set off with a pin, yet must duly be smoothed out with a comb² Croesus and Solon, Periander and Polycrates, Alcibiades in fine and Socrates

8 Who doubts that a wise man is distinguished from an unwise man preeminently by his sagacity and choice of things and judgment, so that if there be an option and alternative between riches and poverty, though they are both of them devoid of vice and virtue, yet the choice between them is not devoid of praise or blame For it is the special obligation of the wise man to choose rightly, and not wrongly put this first or that second

9 If you ask me whether I covet good health, I should, if I were a philosopher, say no; for a wise man must not covet or desire anything which it may be he would covet in vain; nor will he covet anything which he sees to lie in the power of Fortune³ Yet were the choice of one or the other forced upon me, I would rather choose the fleetness of Achilles than the lameness of Philoctetes A similar course must be kept in eloquence You should, therefore, not covet it too much or too much disdain it: yet if

¹ Pliny says the same M H 11 26 § 12

² eloquence, great as it

THE CORRESPONDENCE OF

aversere tamen,¹ si eligendum sit, longe longeque eloquentiam infantiae praeferas

Ambr 400

10 Audivi te nonnumquam ita dicentem *at enim quom aliquid pulchrius eloculus sum, placeo mihi ideoque eloquentiam fugio* Quin tu potius illud | corrigis ac mederis, ne placeas tibi, non ut id, propter quod places, repudies? Nam ut nunc facis alibi tu medicamenta obligas Quid tandem? Si tibi placebis quod iuste iudicaris, iustitiam repudiabis? Si placebis tibi pro aliquo cultu parentis, pietatem aspernare? Places tibi quom facundus igitur verbera te quid facundum verberis?

11 Tametsi Plato ita diceret itaque te compellret *O iuuenis, periculum est tibi praepropera placendi fuga novissimum namque homini sapientiam colenti amiculum est gloriae cupido id novissime exiit* ipsi ipsi, inquam, Platonis in novissimum usque vitae finem gloria amiculum erit.

Illud autem audisse me memini pleraque sapientes viros id est in² scitis mentis atque consultis, habere debere, quorum interdum usu abstineant, itemque interdum nonnulla in usu habere debere, quae dogmatis improbent, neque ubique rationem sapientiae rectam et usum vitae necessarium congruere

12 Fac te, Caesar, ad sapientiam Cleanthis aut Zenonis posse pertingere, ingratus tamen tibi pur

¹ Hein lorf for Cod t em

For Cod id inest Kluss reads id institutus mentis

a choice must be made you would far and far prefer eloquence to dumbness

10 I have heard you say sometimes, *But indeed, when I have said something rather brilliant, I feel gratified, and that is why I shun eloquence* Why not rather correct and cure yourself of your self gratification, instead of repudiating that which gratifies you For acting as you now do, you are tying a poultice in the wrong place What then? If you gratify yourself by giving just judgment, will you disown justice? If you gratify yourself by shewing some filial respect to your father, will you despise filial duty? You gratify yourself, when eloquent chastize yourself then, but why chastize eloquence?

11 And yet Plato would tell you this and take you thus to task *Perilous, young man, is that hasty avoidance of self gratification, for the last cloak that wraps the follower after wisdom is the love of fame, that is the last to be discarded*¹ to Plato, to Plato himself, I say, will fame be a cloak to his very last day

This also I remember to have heard, that wise men must needs have many things—I mean in their mental rules and postulates—to which in practice they occasionally give the go by, and occasionally also must needs allow in practice some things which they cry out upon in their tenets, and that the right rules of wisdom and the necessary practices of life do not everywhere coincide

12 Suppose that you, O Caesar, succeed in attaining to the wisdom of Cleanthes or Zeno, yet

¹ "The last infirmity of noble mind" see Plato (*ap Athen xi 507 D*), *τελευταίον τὸν τῆς δόξης χρίσμα ἐν τῇ βίᾳ αὐτῇ ἀποδιδόμενα* cp also Tac *Agr 9*, *Hist. iv 6*, *Plut in Sené, c c.*, 783 D, *Lucian, Peregr 38*.

THE CORRESPONDENCE OF

pureum pallium erit sumendum, non pallium¹ philo
 sophorum soloci lana Purpureo |
 Cleanthes aqua de puteo extrahenda victum quære
 bat, tibi si penumero curandum in theatro crocum
 longe atque alte exprimitur² . . . |
 Diogenes cynicus non modo nullam pecuniam quæ
 sivit sed etiam propriam neglexit . . . undique ea
 . . . mensa et . . . familia tu . . . famæ
 . . . Socrate . . . sapientior . . . alienum
 . . . vocalem . . . carmina quorundam
 1? . . . <dei> | immortales sint comitum et
 rostra et tribuna Catonis et Gracchi et Ciceronis
 orationibus celebrata hoc potissimum saeculo conti
 niscere? orbem terræ quem vocalem acceperis,
 mutum a te fieri? Si linguam quis uni homini exse
 cet, immanis habetur, eloquentium humano generi
 exsecrare mediocre facinus putas? Num³ hunc ad
 numeras Tereo aut Lycurgo? qui Lycurgus quid
 tandem⁴ mali facinoris admisit, quom vites ampu
 tavit? Multis profecto gentibus ac nationibus pro
 fuisset vinum undique gentium exterminatum Ta
 men Lycurgus poenas caesarum vitium luit Quare
 metuendam censeo divinitus poenam eloquentiæ
 exterminatæ Nam vinea in unius tutela dei sita
 eloquentiam vero multi in celo diligunt Minerva
 orationis magistra, Mercurius nuntius præditus,

¹ The margin of Cod. gives, as epithet of *pallium* con
sucidum = wool newly shorn
² E. . . .
³ . . .
⁴ . . . sentence and

against your will¹ you must put on the purple cloak, not the philosopher's mantle of coarse wool. Purple Cleanthes gained his livelihood by drawing water from a well; you have often to see that saffron-water is sprinkled broadcast and high in the theatre² Diogenes the Cynic not only earned no money but took no care of what he had³

13. What, will the Immortal Gods allow the Comitium and Rostra and tribunals, that echoed to the speeches of Cato and Gracchus and Cicero, to be hushed in this age of all others? the wide world, which was vocal when you received it, to become dumb by your doing? If one cut out the tongue of a single man, he would be deemed a monster; to cut eloquence out from the human race—do you think that a trivial crime? Do you rank the doer of this with Tereus and Lycurgus? and this Lycurgus, what evil deed pray did he commit when he lopped the vines? It had surely been to the benefit of many a race and nation had the vine been extirpated from the face of the earth. Yet Lycurgus paid dear for his felled vines. Wherefore I hold that the extirpation of eloquence must fear vengeance from Heaven. For the vine is placed under the patronage of one God, while eloquence is the delight of many a denizen of Heaven—Minerva the mistress of speech, Mercury

¹ See Capit. *Vit. Mar.* v. 3, and Marcus, *Thoughts*, v. 16; vi. 12

² For this custom see Pliny, *N.H.* xxi. 6.

³ This may have been followed by some such sentence as "but you will have to provide for the finances of the state and see that they are husbanded."

THE CORRESPONDENCE OF

Apollo pæanum auctor, Liber dithyramborum
cognitor, Fauni vaticinantium incitatores, magistri
Homeri Calliope, magister Ennii Homerus et
Somnus.

14. Tum si studium philosophiæ in rebus esset
solis occupatum, minus mirarer, quod tanto opere
verbi contemneres. Discere te autem *ceraurus* et
Ambr. 271 *coritus* et *psudomenus*, verba contorta et ridiculæ,
neglegere vero cultum orationis et gravitatem et
maiestatem et gratiam et nitorem, hoc indicat loqui
te quam eloqui mille, murmurare potius et friggere
quam elangere. Diodori tu et Alexini verba verba
Platonis et Xenophontis et Antisthenis antepone?
ut si quis histrioni studiosus Tasuri gestu potius
quam flocci uteretur; ut si in natando, si æque
liceret, ranam potius quam delphinum æmulari
mallet, coturnicum potius pinnis brevibus quam
aquilæ maiestate subire?

the controller of messages, Apollo the author of pæans, Liber the defender of dithyrambs, the Fauns inspirers of prophecies, Calliope the instructress of Homer, Homer the instructor of Iunius, and Sleep¹

14 Again, if the study of philosophy were concerned with practice alone, I should wonder less at your despising words² so much. That you should, however, learn *horn dilemmas*,³ *heap-fallacies*,⁴ *harsyllogisms*,⁵ verbal quibbles and entanglements,⁶ while neglecting the cultivation of oratory, its dignity and majesty and charm and splendour—this shews that you prefer mere speaking to real speaking, a whisper and a mumble to a trumpet note. Do you rank the words of Diodorus and Alexinus⁷ higher than the words of Plato and Xenophon and Antisthenes? as though anyone with a passion for the stage should copy the acting of Tisircus rather than Roscius, as though in swimming were both possible, one would choose to take pattern by a frog rather than by a dolphin, and sit rather on the puny wings of quails than soar with the majesty of an eagle.

15 Where is that shrewdness of yours? where your discernment? Wake up and hear what Chrysippus himself prefers. Is he content to teach, to disclose the subject, to define, to explain? He is not content but he amplifies as much as he can,

answer cannot be given in any definite number of grains. See Hor. *Ep.* II. i. 47, *Elusus ratione ruc t s acervi*.

¹ "If a man says he is lying, is he lying or speaking the truth?"

For these fallacies see Diog. Laert. *Euclides*, iv, and Zeller *Socrates* ch. xii.

² Lit. twisted, or intricate, and entangling.

³ A captious disputant who made use of the horn dilemma. Cicero mentions him with Diodorus, and speaks of his *contorta sophismata*. See next page.

he exaggerates, he forestalls objections, he repeats, he postpones, he harks back, he asks questions, describes, divides, introduces fictitious characters, puts his own words in another's mouth: those are the meanings of αὔξειν, διασκειάζειν, ἐξεργάζεσθαι, πάλιν λέγειν, ἐπαιαφέρειν, παράττειν, προσωποποιεῖν¹

16. Do you see that he handles almost all the weapons of the orator? Therefore if Chrysippus himself has shewn that these should be used, what more do I ask, unless it be that you should not employ the verbiage of the dialecticians but rather the eloquence of Plato? A sword must be used in fight against (opponents), but it matters much whether the blade be rusty or burnished

. . . Epictetus
if he had dared, an epitaph²
carried through with the greatest credit
. If anywhere a disciple of
Anaxagoras³ not of the sycophant Alexinus

17. The tragedian Aesopus is said never to have put on a tragic mask without setting it in front of him and studying it a long time that he might conform his gestures and adapt his voice to the face of the mask
. or do you think it a greater task to write the tragedy *Amphiaraus*⁴ than to speak on the subject of an earthquake? . . . you argue about a thunderbolt

¹ The passage is somewhat difficult to understand, but it is clear that the author is referring to the various rhetorical devices used by Chrysippus. The text is: "late, nam. lame | And to the Immortals dear."

² i.e. Pericles. See Cic. *De Orat.* iii. 34; *Orat.* iv. 15

⁴ He was swallowed up by an earthquake, while trying to escape from the disastrous expedition against Thebes. There seems to be a reference to the Cyzicus earthquake in 162

THE CORRESPONDENCE OF

18 Dabit philosophia quod dicas, dabit eloquentia quomodo dicas . . . <nam si quis>¹ dialecticorum verbis scribat, suspirantem, tussientem immo Iovem scripserit, non tonantem Para potius orationem dignam sensibus, quos e philosophia hauries, et | quanto honestius sentias, tanto augustius dicas Quin erige te et extolle, et tortores istos, qui te ut abietem aut alnum proceram incurvant et ad chamæretort² detrahunt, valido cacumine tuo excute, et tenta an usquam ab <optima via> discesseris. Sed comitem philosophiæ <eloquentiam adscisce et istos>³ sermones gibberosos retortos <abice quos>

⁴ si teneris, contemnas, quom contempseris, nescias Die, obsecro, mihi de dialecticis istis ecquid tenes? Ecquid tenere te gaudes? Nolo mihi dicas apud te ipse reputa. Ego illud prædico, quom plurimos amicos in hac disciplina teneris . . .⁵

(Naber, p 148)

DE ELOQUENTIA 2

<ANTONINO AUGUSTO FRONTO>

|

nullius ante, nisi unius Gaii Sallusti, trita solo, sensum dictu periculosum et paene opstetricium pulcherrimo

¹ Heindorf ² Niebuhr prefers *chamaestrola*

³ Hein lorf also *abi e quos*

⁴ Thirteen lines are lost

⁵ There is a gap, says Naber, of 32 pp between *teneris* and *nullius*

18 Philosophy will tell you what to say, Eloquence how to say it¹. . . For, using the language of dialecticians, a writer would speak of a Jove sighing, nay rather wheezing, not thundering. Provide yourself rather with speech worthy of the thoughts you draw from philosophy, and the more noble your thoughts, the more impressive will your utterance be. Nay, lift yourself up and stand upright, and shake off with your strong top those tree-twisters who are bending you down, like a fir or stately alder, and lowering you to the level of stunted bushes, and make trial whether you have anywhere swerved from the right way. But summon Eloquence, the handmaid of philosophy, and cast away those crooked, twisted modes of speech which if you took them in, you would despise, and ignore when you have despised them. Tell me, I pray you, do you take anything in from your dialectics? are you proud of taking in anything? You need not confess to me, but think it over with yourself. I prophesy this, though you have kept many of your friends loyal to this teaching.

ON ELOQUENCE 2

FRONTO to Antoninus Augustus

? 162 A D

in a field *previously trod by the foot of no one*² save Gaius Sallustius alone, you brought to light in a most choice dress and a most becoming setting a

¹ The position of this sentence is not certain. Brakman says it comes two sentences lower down.

² Lact. 1. 92o

THE CORRESPONDENCE OF

cultu et honestissimo ornatu protulisti Εὐφρανας,
ὑπερεὐφρανας, σῶζέο μοι Quod librari manu epistula
scripta est, a labore gravi digitis consului qui sunt iam
in suspicione

(Naber, p 149)

DE ELOQUENTIA 3

ANTONINO AUGUSTO Fronto

1 Quid sciutetur qua . . . propera
. . . neque balbam virginem, quae vestalis sit,
capi fas est, neque sirbenam¹ [verba de
balbutientibus ponenda varie]² minus
balbutientium vox his ferme verbis significatur vox
impedita, vox *incta*, vox *difficilis*, vox *trunca*, vox
imperfecta, vox *absona* His contraria quaerenti tibi
subvenisse certum habeo, vox *expedita*,³ vox *absoluta*,
vox *facilis*, vox *integra*, vox *lenis*⁴ Tua vox
vere his omnibus quibus vocabulis
appellentur sirbeni percensio sit |

2 | Vocis modulatae amatores primas audisse fer
untur aves vernas luco opaco Post pastores recens
reptis fistulis se atque pecus oblectabant Visae
fistulae longe avibus modulationes⁵
murmurantium | oculis in loco⁶ eloquentiae oblec-

¹ From the margin of the Codex

² *Ibid* possibly only a gloss ³ *ml eximia*

⁴ For the restoration of this passage see Hauler, *Bien Stud*
xxii. The contrary to : *perfecta* seems to have dropped out

⁵ The above are from the margin The rest of Ambr 374
is illegible ⁶ *Mar, in luco*

meaning hard to express and needing almost a mid wife's aid You have given me joy, you have overjoyed me, may you be preserved to me In having this letter written by my secretary I have saved my fingers from a heavy task,¹ as they are not at present to be trusted

ON ELOQUENCE 3

FRONTO to Antoninus Augustus

? 162 A D

1

Neither a virgin that lisps may be chosen as a Vestal nor one that speaks indistinctly² Words descriptive of stammerers to be variously employed the utterance of stammerers is generally described as follows an impeded utterance, a tied utterance, a laboured, a defective, an imperfect, a discordant utterance The contraries of these have, I doubt not, already rewarded your search a free utterance, a distinct, an easy, a perfect, a smooth utterance Your utterance A survey of all the terms applied to indistinct speakers

2 The lovers of melodious utterance are said to have listened first to the birds in a shady covert Next shepherds delighted themselves and their flocks with the newly invented pipes Pipes seemed far more melodious than birds . . . they take delight by way³ of eloquence in the soft notes of

¹ A great part of this letter has obviously been lost

² See Aulus Gellius : 12 This paragraph seems rather out of place It has much affinity with the similar passage in *De rationibus ad med* below

³ Reading *luco* we must translate "of whisperers, or warblers, in the grove of eloquence"

THE CORRESPONDENCE OF

tantur Ennium deinde et Accium et Lucretium ampliore iam mugitu personantes tamen tolerant. At ubi Catonis et Sallustii et Tulli tubi exaudita est, trepidant et pavent et fugam frustra meditantur. Nam illic quoque in philosophiae disciplinis, ubi tutum sibi perfugium putant, Platonis phormata erunt audienda.

3 Haec in eos fabula competit, qui nulla indole praediti eloquentiam desperantes fugitant. Tibi, Caesar, ut cui maxime, sublime et excelsum et amplificum ingenium ab deis datum est. Nam primi tui sensus et incunabula studiorum tuorum mihi cognita sunt. Elucebat iam tunc nobilitas mentis et dignitas sententiarum, quibus sola tum deerant verborum lumina ea quoque variis exercitationibus instruebamus.

4 Ibi tu mihi videre mor<e iuven>ali et laboris taedio defessus, eloquentiae studium reliquisse, ad philosophiam devertisse, ubi nullum prohoemium cum cura excolendum, nulla narratio breviter et dilucide et callide collocanda, nullae quaestiones partiendae, nulla argumenta quaerenda, nihil ex aggerandum | . . [mutilum perficere, huiusmodi fartis iugare] . . . consiliario huic magis aetati opus est quam auxilio <amico>¹ . . . mutilum perficere, huiusmodi explere, asperum levigare²

¹ From the margin of Cod ; cp. *Plant. Truc.* II 1 8

² *Il vñ Stud.* 23, p. 333, Hauler

mutterers. Anon they nevertheless put up with Ennius and Accius and Lucretius, resonant now with a fuller bass. But when the trumpet of Cato and Sallust and Tullius is heard upon the air, they are excited and affrighted and bethink them of flight, vainly, for even there in the teachings of Philosophy, where they think they have a safe refuge, the resonant periods of Plato will have to be heard.

3 This little story¹ applies to those who having no aptitude for it, shun eloquence in despair. But to you, O Caesar, if ever to it in, has been given by the Gods a sublime and lofty and splendid genius, for your earliest thoughts and the infancy of your studies came under my ken. From the very first there was no hiding your nobility of mind and the dignity of your thoughts. They wanted then but one thing, the illumination of words. That too, we were providing by a varied course of study.

4 At this point, in the manner of the young and from a dislike of drudgery, you seem to have deserted the pursuit of eloquence, and to have turned aside after philosophy,² in which there is no exordium to be carefully elaborated, no marshalling of facts concisely and clearly and skilfully, no dividing of a subject into heads, no arguments to be hunted for, no amplification.

to complete what is imperfect, to fill up gaps with padding
 this age requires a friend for counsel rather than for help
 to complete what is imperfect,
 to fill up a hiatus, to make rough places smooth

¹ The evolution of eloquence just given

² See i p 217, *Ad M. Caes. iv 13* and *cp. Thoughts i. 7* and 17, §4

THE CORRESPONDENCE OF

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¹ From the margin of Cod. , cp Plaut. Truc. II i 8

² *Il ien. Stud.* 23 p. 338, Hauler

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¹ The evolution of eloquence just given.

² See i. p. 217, *Ad M. Cato.* iv. 13, and *cp. Thoughts*, i. 7 and 17, § 4.

THE CORRESPONDENCE OF

Ambr 37

5 | Nonne omnes oratorum copias sectabare,¹
refutandi solertiam, augendi facultatem, eludendi
venustatem, permovendi delectandique, deterrendi
incitandique, hortandi² conciliandi, inflammandi³
leniendi audientium animos aut alliciendi, rectam
quendam in dicendo potentiam ac potestatem?

Iam si quando tibi negotiis districto perpetuis
orationis conscribundae tempus deesset, nonne te
tumultuariis quibusdam et lucrativis studiorum sol
acis fulcibus, synonymis colligendis, verbis inter
dum singularibus requirendis⁴ ut veterum commata
ut⁵ cola, synonymorum ratione converteres, ut de
vulgaribus elegantia, de contaminatis nova redderes
imaginem aliquam accommodares, figuram iniceres
prisco verbo adornares, colorem vetusculum appin
geres Haec si propterea contemnis, quia didicisti
philosophiam quoque discendo contemnes

Ambr 386

6 Sed non ea sunt ista quae possis contemnere
possis sane non amare Ut olim Crissus tristis
risum oderat, ut nostra huc memoria Crassus lucem
fugitabat, ut nostra ibidem memoria vir consulans
campos formidabat Pomptinum Campum multaque
loca clausi lecticula praetervehebatur⁶

an tibi saepe supersit tamen si
divisses nonnumquam satis consuluisses
. modum⁶ Virum etiam saepe vir sapientissi

¹ Niel hr for Cod *sectare*

² Beltrami for Cod *ornand*

³ Niebul r for Cod *amand*

⁴ hr

⁵

⁶

the Codex
as we learn from

a marginal note

5 Were you not eager for all the resources of orators, their adroitness in refuting, their talent for amplifying, their charm in evasion, and I know not what kind of downright power and potency, that lies in speaking, of moving and delighting, of deterring and provoking, of exhorting, of conciliating, of inflaming, of calming the minds of hearers or alluring them?

Then if on occasion hindered by perpetual business you had no time to compose a speech, did you not fortify yourself with certain hurried yet valuable recreations in the way of study, by collecting synonyms, at times by searching out remarkable words? so as to turn the periods of old writers and their clauses by the system of synonyms¹, to render refined what was vulgar, and fresh what was soiled, fit in some image, throw in a figure, embellish with a good old word, add a patina of age. If you despise all this only because you have learnt it, you will also despise philosophy in the learning.

6 But these are not things which you could despise—dislike them of course you might. As in old days a morose Crassus² hated laughter, as in our time here a Crassus³ hid from the daylight, and again in our time a man of consular rank had a horror of plains, and traversed the Pomptine plain and many other places with his litter closed

But often even the wisest of men does not know how to speak in a

¹ i.e. apparently paraphrasing old writers by using synonymous but more striking expressions.

² The grandfather of Crassus the triumvir, called *δυσχερής*.

³ Probably Crassus Frugi Spart. *Vit. Hadr.* 5.

THE CORRESPONDENCE OF

Ambr 885

nus <eloqui> nescit novo plane modo Sed
ita res tulerunt de puteo quoque Puteus
istic minus sorderet <senten>[tias inopina
tas, alius <quidem no]is et prius in>tactas Tanto
maius periculum sententis inest, nisi figurationibus
moderatis temperantur Graecis verbis fortasse
apertius significabo τὰ καινὰ καὶ παραδοξα τῶν ἐπι
μηματωι εἰ <εἰ>πει αὐτα πλα <εἰ>πε
ἡ πιθανὰ Hoc ego animo nullis
rationibus liber quem misti¹ rarus Scias igitur
in hoc uno eximiam eloquentiam tuam claudere

7 Moneo igitur Marcum meum etiam itque etiam,
et ut meminerit obsecro, quotienscumque ἀδοξότερον
ἐνθυμημα conceperis, volvas illud tecum² et diversis
et variis figurationibus verses tempestque et verbis
splendidis excolas Nam quae nova et inopinata
audientibus sunt, periculum est nisi ornentur et
figurentur ne videantur absurda

Ambr 876

8 Cetera omnia tibi in eloquentia expolita et ex
planata³ sunt Scis verba quaerere, scis reperta recte
collocare, scis colorem sincerum vetustatis appingere,
sententis autem gravissimis et honestissimis abun
das <pri>[ma] conditio est, ubi semel pate
factae sunt, facile cognitae negleguntur Contemni
denique et nullo honore esse rhetora videas, obser
vari autem et omnibus officiis coli dialecticos, quod

¹ Haulers reading Mai and Brakman saw *more* in the margin ² Heindorf for *Cod. ten et*

³ This is Mai's reading Niebuhr prefers *exp. diva.*

⁴ Neither Mai nor Naber tell us the extent of the lacuna here but Mai follows it with the passage which Naber puts first in his *De Eloquentia* l.

M. CORNELIUS FRONTO

style obviously new But circumstances hve so
 a well there would sound less vulgar
 thoughts unexpected, to others indeed new
 and previously unused So much greater peril is
 there in thoughts if they are not qualified with
 figures of speech springly used I can perhaps
 express my meaning more clearly in Greek words: τα
 καὶ καὶ παραδοξα τῶν ἐπιμημάτων¹

. the book which you
 sent a scarce one Know then that in this one
 point your eloquence limps, splendid as it is

7. I warn you, therefore, again and again, my
 Marcus, and beseech you to remember, as often as
 you conceive in your mind a startling thought,
 think over it with yourself and turn and try it with
 various figures of speech and dress it out in splendid
 words For there is a danger that what is new to
 the hearers and unexpected may seem ridiculous
 unless it be embellished and made figurative

8 All else in eloquence are for you smoothed
 and made clear You know how to search out
 words, you know how to arrange them correctly
 when found, you know how to invest them with
 the genuine patina of antiquity, and you have an
 abundance of the weightiest and noblest thoughts
 is the first essential, as soon as they
 have been exposed they are easily known and dis-
 regarded In a word, you could see that the
 rhetorician is despised and of no account, while
 the dialecticians are courted and treated with

¹ "New and startling thoughts" Fronto urges Marcus
 to aim at striking and unconventional ideas but to be care-
 ful that they should be toned down by their setting so as
 not to strike the hearers as bizarre

THE CORRESPONDENCE OF

in eorum rationibus semper obscuri aliquid et tortuosi <sit>, eoque fit ut magistro discipulus haereat semper et inserviat, vinctus perpetuis quibusdam vinculis adtineatur

Dicet aliquis *tu igitur praeter ceteros nimirum verbis pulchris et insignibus uteris*²¹ Ego immo vulgaribus et obsoletis Quid igitur est? Nisi istud saltem scirem, deterioribus uterer

(Naber p 153)

DE ELOQUENTIA 4

ANTONIO AUGUSTO Fronto

1 Pleraque in oratione recenti tua, quod ad sententias adtinet, animadverto egregia esse, prae admodum uno tenuis verbo corrigenda, nonnihil interdum elocutione novella parum signatum Quae melius visum est particulatim scribere, ita enim facilius perpendes singula et satis temporis ad inspicendum habebis, ut qui plurimis negotiis aut agendis occupatus sis aut actis defessus

Ambr 275 2 Igitur in prohoemio quae egregie a te dicta putem, quaeque arbitrer corrigenda, scripsi tibi Scripturum deinceps pro amore in | te meo confide cetera. Prima ergo pars tota mirifica est, multis et gravibus sententis referta, in quibus eximiae sunt . . . Si recte . . . quo genere Cato . . . Si

²¹ Niebuhr for Cod. *utens*.

M. CORNELIUS FRONTO

every respect, because in their ratiocinations there is always something obscure and intricate, and hence it results that the disciple always hangs upon his master and is his slave, held fast bound with a kind of everlasting fetter

Someone will say *You then, of course, beyond all others use choice and striking words* Nay, I use common and old ones What then? If I knew not that much, I should use words still worse

ON ELOQUENCE 4

FRONTO to Antoninus Augustus

2 162 A D

1 Most things in your late speech, as far as the thoughts go, I consider were excellent, very few required alteration to the extent of a single word, some parts here and there were not sufficiently marked with novelty of expression¹ I have thought it better to write to you on these points in detail, for so you will the more easily consider them separately and have time to look into them, being as you are busied with the actual discharge and worried with the past performance of very many duties

2 Well then I have written to tell you what I consider excellently said by you in your exordium, and what in my opinion needs alteration Do not doubt that what I shall further write will be written in the spirit of my love for you All the first part then is wonderfully fine, packed with many weighty thoughts, in which these stand out . . . in which kind Cato . . . if sparingly and with dignity

¹ Professor Mackail takes this to mean the "new Latin" style introduced by Fronto.

THE CORRESPONDENCE OF

Ambr 384 parce et cum dignitate multo deinde gravior
 et severior subiuncta <est sententia> si
 nihil nobis opinionis | tralatum, tum
 <si> res ita impulerint vineas.
 Inesse alterum proprium *comes*, alterum tra-
 latum *opifex* Neque ulla verbis istis inter se com-
 munio est neque propinquitas Offendit igitur iures
 ingruens diversitas naturae¹ sapere
 Sallustius *quique manu ventre pene bona patria
 laceraverat* Vides quantum similitudine verborum
 formae assecutus sit, ut verbum postremum, quam
 quam parum pudicum, non indecorum esse videtur,
 ideo scilicet quod <duo> verba similia praecedunt
 Quodsi ita haec verba contra dixisset: *quique pene
 bona patria laceraverat*, indita² obscenitas verbis
 appareret manu ventre Ad aures,
 tertioque | διασκευῇ et ταρεκβάσει evendum
 3 Enimvero ad philosophum librum legas, magis
 tro interpretante tractus attendas, intellexisse ad-
 nris, alius legentibus ipse plerumque dormites,
 audias τί τὸ πρῶτον, τί τὸ δεύτερον, diu multumque
 numerari εἰ ἡμέρα ἐστίν, φῶς ἐστίν, fenestris paten-
 tibus laborari Securus inde abers, cui nihil per
 noctem meditandum aut conscribendum, nihil magis
 tro recitandum, nihil de memoria pronuntiandum,
 nulla verborum indagatio, nullius synonymi ornatus,
 nihil de Graeca in nostram linguam pariter verten-
 dum In eos quoque meus magister Dionysius

Ambr 384
 following
 383 which
 is totally
 illegible

¹ The margin of Cod has in alio *pere*

² Query *ταρεκβάσει* . . . *verbi* Several have proposed *ταρεκβάσει*

. . . then follows a much weightier and austerer thought if circumstances so compel the one word specific—*companion*, the other figurative—*artisan*. Nor is there any connexion or relationship between these words. The ear therefore is offended by the in herent contrast obtruded upon it

. . . Sallust says "and one who had also wasted his patrimony *manu ventre pene* ¹ You see how much the writer has effected by the likeness in the form of the words, so that the last word though far from modest does not strike one as indecent for the reason doubtless that two similar words precede it. But if on the other hand he had spoken the words thus *quique pene bona patria laceraverat*, the obscenity attached to the words would be obvious

must lack disposition and digression

3 To be sure you would read a book to your philosopher,² listen in silence while your master explained it, shew by nods that you understood him, while others were reading, you would yourself mostly sleep, would hear reiterated at length and often *What is the first premiss? What is the second?* with windows wide open hear the point laboured, *If it is day, it is light*. Then you would take your departure without a care, as one who had nothing to think over or write up the whole night long, nothing to recite to a master, nothing to say by heart, no hunting up of words, no garniture of a single synonym, no parallel turning of Greek into our own tongue. Against them³ too did my master Dionysius the

¹ Cat. l. 14

² Fronto is making fun of the dialectic method of teaching contrasted with the rhetorical. ³ The dialecticians.

THE CORRESPONDENCE OF

Tenuior et compositam fabulam protulit de disceptatione vitis et arboris ilicis

4 Vitis se ante ilicem ferebat, quod suavissimum fructum hominum convivis et Osiris¹ altaribus crearet, idem dulce esu, idem huiustu iucundum Tum se maiore cura quam Cleopatram reginam ornari, comptius quam Laidem formosam Pampinos suos ita pulchros esse ut necterentur ex eis Libero thyrsi, corona Sileno, Nymphis Bacchisque redimicula; ilicem esse horridam infructuosam inamabilem, creare boni aut amoeni numquam quicquam | praeter glandem et in lacerata. Item vos² Nunc ego consulto in fabulis finem facio, ut, si qua acrius dicta sunt, permixta fabulis molliantur³

Ad Verum Imp ii 6 (Naber, p 133)

<DOMINO meo Vero Augusto>

. . . . | animi mei perturbatione non possem Sed acceptis litteris tuis, ea re iam primum bona spes mihi ostentata est, quod tua manu scripseras, deinde quod post abstinentiam tridui et sanguinem satis strenue et prompte demissum, liberatum esse te periculo impendentis valetudinis nuntiabas Re spiravi igitur et revalui et apud omnes foculos aras

¹ See Hauser (*Vers d Phil* 41, p 79) for this passage.

² About a column and a half are lost in the lacunae

³ This sentence is from the margin

¹ He was called *λεπτός* (see Athen xi 7) and also *ἀσπράλαφος*, from a line in Homer (*Il* ii 512) which he often quoted

Slender¹ indite a quite artistic apologue on a dispute between the *Vine and the Holm oak tree*

4 The vine vaunted herself above the holm oak because she bore the most delicious of all fruits for the banquets of men and the altars of Osiris, alike sweet to eat and delightful to quaff. Then, again, she was arrayed with more care than queenly Cleopatra, with more taste than lovely Lais. So fair were her branches that from them were wound the thyrsus-wands for Liber, a garland for Silenus, and chaplets for the Nymphs and Mænads. But the holm oak was rough, barren, unattractive, and never produced anything of any goodness or beauty except acorns Now I purposely end with fictions that, if I have said anything too severe, it may be softened down by being mingled with fictions

FRONTO TO LUCIUS VERUS

To my Lord Verus Augustus

162 A D

. . . I was so distressed in mind that I could not . . . But on the receipt of your letter, the very fact that you had written with your own hand raised my hopes at the outset, then came your good news that after three days' fasting and a prompt and rather drastic letting of blood you had been freed from the risk of a threatened illness². So I breathed again and recovered and made my prayers at every

¹ Capit (*Vit Veri*, 6) tells us that Verus, while on his way to Asia for the Parthian war, was taken ill at Canusium. It appears that he narrowly escaped having a stroke, such as caused his death in January, 169, at the age of thirty nine

lucos sacros arbores sacratas—nam rure agebam—
supplicavi Et nunc expecto¹ cognoscere ex tuis
litteris, quantum medici² isti dies promoverint ad
vires rescindendas. Enimvero nunc maiore multo cura
diligentiaque opus est, ut paulatim temet compleas,
nec properes ad detrimenta virium resarcienda Nam
id quidem omnium opinione compertum et traditum
est, sanguinem ubi abundet incursum detrahendum
postea pedetemptim esse reparandum

Fac, oro te et obsecro, Domine, quod tuo egregio
ingenio decet, temperes et repares et modificeris
desideris omnibus, quae nunc acriora solito et pro-
caciore existere necesse est post abstinentiam, qua
necessario in tempore usus es

Aubr 433

Fratrem Dominum saluta, quem saluum habebis
si tu saluos eris Vale, Domine dulcissime

Ad Amicos i 11 (Naber, p 181)

Ambr 319
a l med
col 1

| FRONTO Velio Rufo Sem salutem

Figurae orationis sunt quae maxime orationem
ornant Duplex autem genus est figurarum Aut
enim verborum figurae sunt aut sententiarum In
figuris verborum est tropos, metaphora Hac figura
usus sum quom *stagnum*³ dixi de corpore in quo

¹ Haupt *expeto*

² Haupt for Cod *medici* Naber reads *medici* (* misprint)

³ Klussmann for Cod *figurae*

¹ If Capit (*Ut Ver* 6 § 7) is to be trusted there was
much need of this exhortation

hearth, altar, sacred grove and consecrated tree—for I was staying in the country. And now I am waiting to hear from your next letter how much the intervening days have done towards restoring your strength. For, indeed, much greater care and attention are required now, that you may fill your veins gradually and not be in too great a haste to repair your lost strength. For it is a belief verified and traditional that blood when in excess must be promptly drawn off, but must subsequently be regained by slow degrees.

I pray and beseech you, my Lord, take heed, as befits your eminent character, to be sparing and temperate and restrained¹ in all your desires which now, after the abstinence which you have practised on a necessary occasion, must necessarily make themselves felt more keenly and more importunately than usual.

Greet my Lord your brother,² whose health you will ensure if you are well. Farewell, most sweet Lord.

2 162 A D

FRONTO to Velus Rufus Senex,³ greeting.

The figures in a speech are what most set off a speech. There are two kinds of figures, for there are verbal figures or figures of thought. Among the former are trope and metaphor⁴. I employed this figure⁵ when I applied the word *slough* to a body in

¹ Marcus hurried to Canusium to see him see Capit *ibid*

² Nothing more is certainly known of him

⁴ Cicero (*Orat* 17) following Greek precedent, separated tropes from figures. We use trope for the metaphorical use of a word

⁵ Perhaps in the speech *Pro Bithynis* mentioned below

THE CORRESPONDENCE OF

neque <sucus>¹ sincerus neque aqua pura neque ullus humor liquidus, sed ita ut in palude corrupta omnia Quod autem plerosque fugit,² te hominem vehementem et cum doctrina tum multo magis natura validum esse [scirem artes]³ eius modicae⁴ us aliter⁵

Ad Amicos, i. 15 (Naber, p. 184)

FRONTO Praecilio Pompeiano salutem

Verum ex me, mi Pompeiane, uti res est, audies; velimque te mihi verum [dicenti fidem habere Orationem istam *Pro Bithynis* ante annum fere in manus sumpseram et corrigere institueram Tibi etiam Romae tunc agenti nonnihil de ista oratione promiseram Et quidem, si recte memini quom sermo inter nos de partitionibus orationum ortus esset, dixeram et prae me tuleram, satis me diligenter in ista oratione coniecturam, quae in crimine mandatae credis verteretur, divisisse argumentis ac refutasse. Interea nervorum dolor solito vehementior me invasit, et diutius ac molestius solito remoratus est Nec possum ego membris cruciantibus operam ullam litteris scribendis legendisque impendere; nec umquam istuc a me postulare ausus sum Philosophis etiam mirificis hominibus dicentibus, sapientem virum etiam in Phalaridis tauro inclu-

¹ Brakman ² Mai gives this but with doubt.

³ Mai gives these two words doubtfully Brakman says *et idcirco* is followed by *esse* ⁴ Four letters lost

⁵ A lacuna of four pages follows to *meremur* in *Ad Amicos*, i. 12, below.

which there is no sap pure, no water uncontaminated, no fluid clear, but, as in a morass, everything rotting. What, however, escapes most people, I should know, that you, a strenuous man and a strong by training, and much more by nature . . .

2 162 A D

FRONTO to Præcilius Pompeianus,¹ greeting

You shall hear from me, my Pompeianus, the true state of the case, and I would ask you to accept it from me as the truth. It is nearly a year ago that I took that speech *For the Bithynians*² in hand and set about revising it. I also made certain promises to you about the speech when you were in Rome at that time. And, indeed, if I remember rightly, when we were discussing the rhetorical heads of a speech, I claimed, and with some pride, that I had in that speech very thoroughly analyzed in argument and confuted the assumption which turned on the charge of murder by mandate. Meanwhile, a more than usually severe attack of neuritis came on, which proved to be more persistent and troublesome than usual. And I cannot pry any attention to writing or reading letters when my limbs are racked with pain, nor have I ever ventured to make such a demand upon my strength. When philosophers, those wondrous creatures, tell us that the wise man, even if shut up in the Bull of Phalaris,³ would still

¹ Nothing is known for certain about him. He was possibly a fellow countryman of Fronto's from Cirta.

² Nothing more is known of this speech beyond what Fronto tells us.

³ A common place of the orators. See *Cic. Tus.* ii. 7, Seneca, *Ep.* 66 etc.

THE CORRESPONDENCE OF

sum beatum nihilominus fore, facilius crediderim
beatum cum fore quam posse tantisper amburenti in
alieno prohocumum meditari aut epigrammata¹ scri
bere

Reconciliata deinde mihi longo post tempore com
moda valetudine aliis egi res potius² adversus istam
orationem alienato animo sui, nec pudebit me fiteri
odiam ac similitatem | . . Redut igitur
post repudium renuntiatum oratio domum meam et
mecum denuo mansitavit³ ab inu anucella⁴
.

Ad Amicos, i 16 (Naber, p 185)

<FRONTO> Praecilio Pompeiano <salutem>
Lege, carissime mihi¹ <Pompeiane> .
. . Venetus² venalis est Scis hoc perpetuum
Veneti fatum esse, ut nunquam venerit, venerit
semper³ | dis curare Rescribit mihi litteras
se nullas accepisse Tu certum . . . loquar
. . . . quidquid consenuisse sim
. . . . carissima⁴

Ad Amicos, i 17 (Naber, p 185)

<FRONTO> Claudio Iuliano <salutem>
Habuisti igitur domi,⁵ <mi Naucelli> . Ita
instituumus amicitium, ut haec volgaris officii negle

¹ Niebuhr would read *epicheiremata* (arguments)

² From the margin of Cod

³ *Ibid*

⁴ From the Index (Naber, p 172)

⁵ Mai has *Venetis*

⁶ From the margin of Cod So also the fragments that follow

⁷ These five words may belong to the next letter There are also two words, *Haec salt m*, given by Mai which Niebuhr places between *semper* and *dis curare*

⁸ From the Index

M CORNELIUS FRONTO

be happy, I could find it more easy to believe that he would be happy than that he would be able, while basking in the brass, to muse the while on an exordium or write pointed phrases

Then when after a long interval I had recovered my health, I turned to other matters in preference. I took a dislike to that speech, and will not be ashamed to confess hatred and aversion So the speech has come back home to me after I had publicly disowned it, and taken up its abode with me again

c 162 A.D.

FRONTO to Præcilius Pompeianus,¹ greeting

My very dear friend Pompeianus, read Venetus² is for sale You know that it is the perpetual fate of Venetus to be always going, never gone He writes in answer that he has never received my letter

c 162 A.D.

FRONTO to Claudius Julianus, greeting

You have had then at home, my Naucellius,³ Our friendship has been on such a footing that we could dispense with these conventional

¹ There was another letter to him in this collection (Naber, p 172) but only the opening words remain (from the Index, as read by Hauler, *Wien Stud* 33, pt 1, p 175) *Labris eius labra fori*, I kissed him lip to lip

² *Venetus* may be a proper name, or = *Venetianus* (i.e. a partizan of the 'Blues' in the Circus) or mean a Venetian

³ One of the names of Julianus, who was consul under Pius and provincial legate under Marcus.

THE CORRESPONDENCE OF

geremus vero amore contenti Cum amico
omnia amara et dulcia communicata velim .
nilus lumen eo peruenit ut esset mihi non
tantum carissimus is sed paene solus . . .

Ad Amicos, i 18 (Naber, p 185)

<ΓΡΟΝΤΟ> Claudio Iuliano <salutem>

Ambr 250

Nescio quo pacto sit¹ } omnes provinciales
loqui, multa etiam laboriosius ficere quam ipsa res
postulat acta cognitionum, epistulas omnes denique
ad provinciam adtinentes Ie inuabunt tinsque
. . . .² <ut> adsidue <tu omnia> munera obires
. . . .³ <cum ho>nore provinciales tractare, ut
verum sit quod antiqui veteres dixerunt, τοῦ αὐτοῦ
εἶναι καὶ ταῖς καὶ σπουδαῖς Valerinus . .
bonus si studebam⁴ conclusus, nec
me Valerinus noster videre potuit A Dominis
nostris Imperatoribus non propter aliud amari me
opto, quam ut te quoque participem mei corporis et
animi diligant et cum bonitate eorum certus sum
ita fore

Quoni tibi scriberem, paulo commodius valebam
Adhuc quidem eo tempore eram ex longissima vale
tudine, quam contra curam aequae . .
. . . } . . male mulcavit, recitavi in senatu satis
. . .⁵ <ut> repeterem, postularetur Fac, mi
Nucelli, valetudinis tuae curam agas, ut fortis ad
nos venias Dei praestabunt ut me quoque forti

Ambr 250

¹ From the Index (Naber, p 172)

² .

³ .

⁴ .

⁵ .

⁵ gap ten letters are lost, in the second ten
lines and in the third three lines

services, assured of the reality of our love
 With a friend I would wish all joys and sorrows
 shared it came to this that
 he was not only my dearest friend, but almost the
 single one who

‡ 162 A D

IRONIO to Claudius Julianus, greeting

I know not how it comes to pass all the
 provincials say, to do many things also more labori-
 ously than the case itself requires: memoranda of
 the trials, lastly all letters which relate to the pro-
 vince. They will assist you that you should
 diligently perform all your duties treat the
 provincials with respect, that the saying of the classic
 ancients may be verified, that the same man can be
 both sportive and strenuous Valerianus¹
, nor was our friend
 Valerianus able to see me. I desire not to be loved
 by our Lords the Emperors² on any other terms
 than that you too the partner of my body and mind
 should be included in their love and such is their
 good nature I feel sure that this will be so.

While writing to you, I feel a little better. I am
 still indeed at this time after my most protracted ill
 health, which in spite of care
 roughly handled, I delivered in the
 Senate was asked to repeat it. Be sure, my
 Naucellus, to take care of your health, that you
 may be strong when you come to us. Please God

¹ Possibly the master of the emperor Pertinax (see Capit
Vit Pert 12).

² Marcus Antoninus and Lucius Verus (161-169)

THE CORRESPONDENCE OF

culum invenias. Valerianus noster magnus ad te
plagas rettulit, quas ab omnibus . . . ¹ gravius eum
tractavi quam Stratonichum aut Pyrrillum ² Stragula
mihi linea sculpta† quae germani . . . ³

Ad M. Caes. li 10 (Naber, p. 37).

<DOMINO meo>

Ambr 104,
following
103?

. . . <praedium> | abripere terrae, ut dicitur,
immo cellae filios: tantum de thesauris Antonini
pecuniam prodigi quam nescio quae ista altis
alumna accipiet, unde nihil Egatheus acceperit.
Quanti vero rumores adversi, quanta querimoniae
exorientur bonis lege Falcidia distractis? Lineam
istam famosam atque celebratam ceteraque tantae
pecuniae ornamenta quis emet? Tua uxor si emerit,
praedam invasisse et minimo aere eripuisse dicitur,
eoque minus ad eos quibus legatum erat pervenisse

¹ Two lines lost. ² These two words are not certain

³ Perhaps ten lines are lost here

¹ From the fragmentary nature of the evidence, it is not
easy to understand the legal points in the case alluded to in
these three letters. Matidia Faustina, had made the
her natural heirs is not known. Documents added to the
to the heirs as to certain property. These were cancelled by Matidia, but certain intere-
parties tried to pass them off as valid. Fronto is afraid
that Marcus will for fear of benefiting himself, let them
stand, in which case they might absorb more than the three
fourths of the whole property contrary to the Falcidian law,

you will find me too a little stronger Our friend Valerinus has told you the great blows, which from all (quarters) I have treated him more firmly than Stratonabia or Pyrallus A linen covering

.

FRONTO TO MARCUS ANTONINUS AS EMEROR

To my Lord ¹

162 A D

. . . . that children of the earth, as the saying goes, or rather of the gutter, should snatch the booty that so much wealth from the treasures of Antoninus should be thrown away for that pampered protegee, whoever she is, to get, so that Fgitheus ² will get nothing What unfriendly comments however, what grumbings will arise, when the goods have been dispersed under the Falcidian Law? That celebrated string of pearls,³ which everyone talks of, and all the other ornaments of such value, who will buy them? If your wife buys them, she will be said to have pounced upon the spoil and snatched them away at a very small price, and that so much the less had come to the legatees under the

which stipulated that the heir must receive at least one fourth of the whole inheritance Marcus could either refuse to act as heir, or decide against the codicils, and so bring the gifts mentioned in them into his own share as residuary legatee, or let the codicils stand in spite of the seals being broken (*cp* his own decision in *D q xxviii* 4, 3 and *Gaius* ii 120 and 151) It is most likely that he took the second course though he may also have carried out the cancelled provisions

¹ See *Corp Insc. Lat* vi 8440 *T Aurelius Egetheus Imp Antonini At g Lib a Col* *

² Possibly alluded to by *S aevola*, one of the *amici*, in *D q xxxi* 2, 36

THE CORRESPONDENCE OF

At non emet haec ornamenta Faustina Quis igitur emet margarita, quae filiabus tuis legata sunt? Is margaritis collos filiarum tuarum despoliabis ut cuius tandem ingluvies turgida ornetur?

An hereditas Matidiae a vobis non adibitur? Summo genere, summis opibus nobilissima femina de vobis optime merita intestata obierit? Ita prorsus eveniet ut cui funus publicum decreveris ei ademeris testamentum Adhuc usque in omnibus causis iustum te et gravem et sanctum iudicem exhibuisti ab uxorisne tuae causa prave iudicare inhorbis? Tum tu quidem ignem imitaberis, si proximos am|bures, longinquis lucebis

Ambr 103

Ad M. Caes. ii 17 (Naber, p. 38)

R<ESCRIPTUM> magistro meo

Ergo magister meus iam nobis et patronus erit? Equidem possum securus esse, quomodo duras res animo meo caustissimas secutus sum, rationem veram et sententiam tuam. Di velint ut semper, quod agam secundo iudicio tuo, mi magister, agam.

Vides quid horae tibi rescribam. Nam post consultationem Amicorum in hoc tempus collegi sedulo ea quae nos moverint, ut Domino meo perscriberem faceremque cum nobis in isto quoque

M CORNELIUS FRONTO

will But you will say Faustina will not buy these ornaments Who then will buy the pearls, which were left to your daughters? You will rob the necks of your daughters of these pearls that they may grace whose goitred gorge may I ask?

Shall Matidia's inheritance not be taken up by you? Shall a most noble lady of the highest rank, of the greatest wealth, one who has deserved especially well of you, have thus died intestate? The precise result, therefore, will be, that you will have robbed of her will one to whom you have granted a public funeral Hitherto in every cause without exception you have shewn yourself a just and weighty and righteous judge Will you begin with your wife's case to give wrong judgment? Then will you indeed be like a fire, if you scorch those who are nearest and give light to those who are far off¹

THE EMPEROR MARCUS ANTONINUS TO FRONTO

162 A D

ANSWER to my master

So my master will now be my advocate also! Of a truth I can feel easy in my mind when I have followed the two guides dearest to my heart, right reason and your opinion God grant that whatever I do I may always do with your favourable endorsement, my master

You see how late I am writing my answer to you For after a consultation with my Friends up to this moment, I have carefully collected all the points which weighed with us, so as to write fully to your Lord,² and make him our assessor in this business

¹ See Salustian's *Julianus et Africanus* c. 10.

² It is to be understood that the Emperor was writing to the Emperor.

THE CORRESPONDENCE OF

negotio praesentem Tum demum *ὑποπάρω τοῖς
βελταλείμεναις*, quom fuerint ab illo comprobata.
Orationem, qua causam nostrum defendisti, Faus-
tinae confestim ostendam, et agam gratis ei quod
mihī talis epistula tua legenda ex isto negotio nata
est. Bene et optime magister, vale.

At Amicos, l 14 (Naber, p 183).

AUSIDIO VICTORINO genero <Fronto salutem>

Ambr 313
foll w11 g
314

Ad obruzae tempus¹ . . . | et Varianis alum-
nis masculis feminisque sestertium deciens² singulis
reliquit usurarium potius quam proprium nam quin-
quagenā annua ab Augusta singulis dari iussit.
Plerique omnes, qui eam curaverant, frustra fuerunt
ne librae quidem singulis ponderatae sunt Ausi
sunt tamen nonnulli, navi scilicet et strenui viri,
codicillos, quos iam pridem Matidia inciderat, ob-
gnare, quom illi sine sensu ullo riceret. Ausi etiam
sunt codicillos istos apud Dominum nostrum ut
probe ac recte factos tueri et defendere Nec sine
metu fui, ne quid philosophia perversi suaderet
Quid ad eum de re scripserim, ut scires, exemplum
litterarum misi tibi

In oratione Bithyna, cuius partem legisse te scribis

¹ From the Index as read by Hauler (*Hien Sud* 33
pt 1 p 175) ² Possibly *viciens* in the Codex

¹ He chaffingly calls the letter a speech

² This assaying of the gold (presumably the gold orna-
ments) was done by means of fire in a small flat vessel called
a cupel.

M. CORNELIUS FRONTO

also. Then only shall I have confidence in our decision, when it has been approved by him. The "speech"¹ in which you have advocated our cause, I will shew at once to Faustina, and will tender her thanks because as an outcome of that business it has been my lot to read such a letter from you. Good master, best of masters, farewell.

162 A.D.

FRONTO to Aufidius Victorinus his son-in-law.

At the time of the gold-test² . . . and to her Varian protégés of either sex she left a million sesterces³ apiece for them to enjoy as a life interest rather than for their own; for she directed that 50,000 sesterces⁴ apiece should be given them every year by the Empress. Almost all those who had paid her court lost their labour: not a pound apiece was weighed out to them. Some of them however, brisk and smart fellows without a doubt, had the effrontery, while Matidia lay unconscious, to seal up the codicils, which she had annulled a long while before. They had the effrontery also to uphold and defend these codicils before our Lord as duly and truly executed. And I have not been without apprehension that Philosophy might lead him to a wrong decision. That you may know what I wrote to him on the subject, I send you a copy of my letter.

In my Bithynian speech, part of which you write

² About £20,000

⁴ About £500 It is not clear whether these *alumni* were children of an alimentary foundation, such as the *puellae Faustinae*.

THE CORRESPONDENCE OF

multa sunt nova addita, ut arbitror ego, non inornate, locus in primis de acti vita, quem tibi placitum puto, si legeris quod in simili re M Tullius pro Lⁱ Sulla egregie scriptum reliquit non ut par pari compares, sed ut aestimes nostrum mediocre in genium quantum ab illo eximiae eloquentiae viro abludat.²

(Naber, p 155)

AD MARCUM ANTONINUM DE ORATIONIBUS

<ANTONINO AUGUSTO Fronto>

Ambr 332
following
35"

1 | pauca subnectam fortasse inepta iniqua, nam rursus faxo magistrum me experiare, Neque ignoras omnem hanc magistrorum <turbam>,¹ vanam propemodum et stolidam esse parum eloquentiae et sapientiae nihil. Feres profecto bona venia veterem potestatem et nomen magistri me usurpantem denuo

2 Fateor enim, quod res est, unam solam posse causam incidere, qua causa claudat aliquantum amor

¹ So Cod. by mistake for *P*

² Haupt for Cod. *abludat* (Mai) cp Hor Sat II iii 320

³ Mai Querv <rem>

¹ Owing to the confusion in the leaves of the Codex and their partial illegibility, it is impossible to be quite sure of the position of the various parts of this tractate, and consequently of the thread of the argument. It is obviously connected with the similar letters *D Eloquentia* above being like them an appeal to Marcus not to neglect eloquence for philosophy. Little seems lost at the beginning and Fronto enters at once on an indictment of the false eloquence of Seneca and his school, whom he accuses of trickeries and tautology taking Lucan especially as an instance of the latter fault. He compares their mannerisms to a harpist in a

that you have read, there are many fresh things introduced, not inelegantly as I fancy, particularly a passage on my past life, which I think will please you, if you read that excellent speech on a similar subject in defence of P. Sulla left us by M. Tullius: not that you should compare us as equals, but that you should recognise how far my mediocre talent falls short of that man of unapproachable eloquence

ON SPEECHES

? 163 A.D.

FRONTO to Antoninus Augustus.

1. . . . I will subjoin a few possibly unreasonable and unjust criticisms, for I will make you again have a taste of me as a master.¹ And you are aware that all this company of masters is more or less futile and fatuous—little enough of eloquence and of wisdom nought! You will I am sure bear with me for taking up anew my old-time authority and title of master.

2. For I confess, what is the fact, that only one thing could happen to cause any considerable set back

cantata repeating a note again and again. He also charges such writers with meanness and slovenliness of diction, with effeminate fluency and preciousness. Turning to a speech lately delivered by . . .

and repeats (§ 8)

clear and imperi

refers to a treat

used in his lessons. In § 9 . . .

trend of the argument, but . . .

Senecan style. From this he . . .

a Gallic rhetor and his inapp . . .

abrupt transition from Alexander to the Tiber is puzzling.

In conclusion, he criticises severely an edict of Marcus and

adds a warning against the debased style.

THE CORRESPONDENCE OF

erga te meus—si eloquentiam neglegas Neglegas tamen vero potius censeo quam prave excolas Con fusam eam ego eloquentiam, catachannae ritu¹ par tim pineis¹ nucibus Catonis partim Senecae mollibus et febriculosus prunulis insitam, subvertendam censeo radicitus, immo vero, Plautino ut utar verbo² *ex radicitus* Neque ignoro copiosum sententis et redundantem hominem esse verum sententis eius tolutares video nusquam quadripedo concitas³ cursu ten<d>ere, nusquam pugnare,⁴ nusquam maiestatem studere, ut Laberius *dictabolaria*, immo *dicteria* potius eum quam dicta confingere

3 Itane existimas graviore sententis et eadem de re apud Annaeum istum reperiturum te quam apud Sergium? *Sed non modulatus aeque fateor, neque ita | cordaces ita est, neque ita tinnulas* non nego Quid vero, si prandium utrique adponitur, adpositis oleas alter digitis prendaat, ad os adferat ut manducandi ius fasque est ita dentibus subiciat alter autem oleas suis in altum iaciat, ore aperto excipiat, ut calculos praestigiator, primoribus labris ostentet⁵ Ea re profecto pueri laudent, convivae

¹ So Hauser in *Festschrift Theod. Gomperz*, p. 392

² Brakman for Cod. *Plaut no trato* Stud. prefers *Plaut no* *trato* for which cf. Aul. Gell. in 3 *Plautinorum* and Lucian *I* ii 19 ΠΛΑΥΤΟΥ ΚΑΤΑΤΟΙ

³ For Cod. *ca* to which does not seem to be used like *conculato* ⁴ Heindorf suggests *pungere*

in my love for you, and that is, if you were to neglect eloquence. Yet indeed I would rather you neglected it than cultivated it in the wrong way. For as to that hybrid eloquence of the *calachanna*¹ type, grafted partly with Cato's pine nuts,² partly with the soft and hectic plums of Seneca, it ought in my judgment to be plucked up by the roots, nay, to use a Plutine expression, *by the roots of the roots*. I am aware that he is a man who abounds in thoughts, & bubbles over with them, but I see his thoughts go trot trot, nowhere keep on their course under the spur at a free gallop, nowhere shew fight, nowhere run at sublimity. Like Laberius, he fashions *nut bolts*, or rather *nut flashes*, rather than wit sayings.

3 Do you then suppose that you could find weightier thoughts and on the same subject in your Atnaeus than in Sergius? But (in Sergius)³ not so *rhythmical*. I grant it, nor so *sprightly*. It is so, nor *with such a ring*. I do not deny it. But what, if the same meal be set before two persons, and the one take up the olives set on the table with his fingers, carry them to his open mouth let them come between his teeth for mastication in the decent and proper manner, while the other throw his olives into the air, catch them in his mouth, and shew them when caught, like a juggler his pebbles, with the tips of his lips. Schoolboys of course would clap the feat and the guests be amused, but the one will

¹ See i p 140

² The plain austere eloquence of Cato is compared to the fruit of the wild pine (Hauler refers to Cato *R I* xlvii 3), as contrasted with the soft feverish style of Seneca.

³ Sergius Flavius or Plautus a Stoic who says Quintilian (*Inst* viii 3) for eliminating new words some very harsh

THE CORRESPONDENCE OF

delectentur, sed alter pudice pranderit, alter labellis gesticulatus erit.

At enim sunt quædam in libris eius scite dicta graviter quoque nonnulla. Etiam limine interdum argentiolæ cloacis inveniuntur, eæne re cloacis purgandis redimemus?

4 Primum illud in isto genere dicendi vitium turpissimum, quod eandem sententiam milliens alio atque alio amictu indutam referunt. Ut histriones quom palliolatum saltant, eandem cyeni, capillum Veneris, Furiæ flagellum, eodem pallio demonstrant ita isti unam eandemque sententiam multimodis faciunt, ventilant, commutant, convertunt, eadem lacinia <varia> saltant,¹ refricant eandem unam sententiam sæpius quam puellæ olfactoria sucina.²

5 Dicendum est de fortuna aliquid? Omnes ibi Fortunas, Antistes, Piaenestinas, Respicientes, balnearum etiam, Fortunis omnes cum pennis cum rotis cum gubernaculis reperias.

Unum exempli causa poetæ prohoemium commemorabo, poetæ eiusdem temporis eiusdemque nominis, fuit æque Annæus. Is initio carminis sui septem primis versibus nihil aliud quam *belli plus quam cuncta* interpretatus est. N<umeri>³ replicet quot sententias—*Iusque datum sceleri una sententia est, in sua uictrici conuersum viscera*

¹ For Cod *salutant*. Haupt suggests *eandem loriam volutant*.

² Haupt for Cod *olfactoriae*.

³ Brakman.

have eaten his dinner decently, the other juggled with his lips

You will say, there are certain things in his books cleverly expressed, some also with dignity. Yes, even little silver coins are sometimes found in sewers; are we on that account to contract for the cleaning of sewers?¹

4 The first and most objectionable defect in that style of speech is the repetition of the same thought under one dress and another, times without number. As actors, when they dance clad in mantles, with one and the same mantle represent a swan's tail, the tresses of Venus, a Fury's scourge, so these writers make up the same thought in a thousand ways, flourish it, alter it, disguise it, with the same lippet dance diverse dances, rub up one and the same thought oftener than girls their perfumed amber

5 Has something to be said about fortune? You will find there the whole gallery of Fortunes, Fortunes of Antium, of Praeneste, Fortunes Regardant,² Fortunes too of baths, all Fortunes with wings, with wheels, with rudders

One prelude of a poem³ I will quote by way of example from a poet of the same time and of the same name, an Annaeus like the other. In the first seven verses at the beginning of his poem he has done nothing but paraphrase the words *Wars worse than civil*. Count up the phrases in which he rings the changes on this—and sanction granted to wrong phrase number one, turning their conquering swords, in their own hearts blood to imbrue them

¹ Dryden in his *Essay on Dramatic Poetry*, quotes the proverb *aurum ex stercore colligere*

² i.e. ready to aid men. see Cic. *De Legg* ii 11, §28

³ Lucan's *Pharsalia*, Book I 2 ff

THE CORRESPONDENCE OF

<dextra> iam haec altera est, cognatasque ac
 tertia haec erit, in commune nefas quartam
 inerat, infestisque obvia signis signa accumulavit
 que quintam, pares aquilas sexta haec Herc
 aerumna, et pila minantia pilis septima—de Ai
 scuto corium Annæe, quis finis erit? Aut
 nullus finis nec modus servandus est, cur
 addis et similes lituos? Addis licet et carmina
 tubarum Sed et loriceis et conos et balteos
 omnem armorum supellectilem sequere

Ambr 343

6 Apollonius autem—non enim Homeri
 hoemiorum par artificum est—Apollonius inqu
 qui *Argonautas* scripsit, | quinque res <prorsus
 versis diserte in> quattuor versibus narrat
 φωτῶν, viros qui navigassent, οἱ Ποντοιο καταστι
 iter quo navigassent, βασιλῆος ἐφημοσυνῇ Πελ
 cuius imperio navigassent, <χρυσέϊον> μετακί
 cui rei navigassent, ἐξυγον ἤλασαν Ἀργῶ πᾶσι
 qua vecti essent

Isti autem tam oratores quam poetae consin
 ficiunt atque¹ citharocidi solent unam aliquam
 cilem litteram de Inone* vel de Aedone multis
 variis accentibus <iter>are²

7 Quid ego verborum sordes et illuvies? Q
 verbi modulate collocata <et> effeminata fluent
 . . . Ibi igitur . . . et aversantes <etami>n

¹ Valer for Coli ὡς ἄν

² I Verkamp for Μαίη Ηεννε

³ I d' Μαίη ἔπιν <επιν>are

⁴ This sentence is from the margin of Coli

here we have a second; *kin against kin embattled* that will be a third; *guilt that was shared by all* · he tells off his fourth; *and standards set against standards*: he piles up a fifth to boot; *eagles with eagles matched* · here's the sixth! why, this is a labour of Hercules; *and javelins poised against javelins* · a seventh! a bull's hide from the shield of Ajax Wilt never be done, Annæus? Or if no end or limit is ever to be kept, why not add *clarions also alike*? And you might go on, *and the well-known blare of the bugles* Yes, and follow up with cuirasses and helmets and belts and all the paraphernalia of a soldier

6 Apollonius, however—for Homer's openings are not equally skilful—Apollonius, I say, who wrote the *Argonautica*, describes five quite distinct facts explicitly in five lines κλέα φωτῶι,¹ the heroes who sailed; οἱ Ποντοιοι κατὰ στομα, the route by which they sailed; βασιλῆος ἐφημοσυνῇ Πελῖαιο, at whose hest they sailed, χρυσῆον μετὰ κῶας, on what quest they sailed; ἐύζυγον ἤλασαν Ἀργώ, the ship on which they were carried

These writers, as well rhetoricians as poets, do just what harpers are wont to do, who dwell with many varied intonations on some single vowel from *Ino* or from *Aedon* ²

7. What shall I say of meanness and slovenliness in words? What of words rhythmically arranged and effeminately fluent?
. . . . and from dislike regard with a critical eye

¹ Glories of heroes,—who by the Pontic strait,—as their monarch Pelias bade them,—seeking the Golden Fleece,—rowed forth in the well built Argo

² Musical plays so named from their subjects; but the names are by no means certain, and various others have been proposed instead.

THE CORRESPONDENCE OF

hoc elegantiae¹ genus. <Uti> clipeo te Achillis in orationibus oportet, non parvulam ventilare neque hastulis lustrionis ludere. Aquae de siphunculis concinnius saliant quam de imbribus rem laudant quærit quis istorum prindere apud

Ambr 250

8 - | *oculos convenientes* dixisti. Quis clarius iteratur² apparuit enim utrumque verbum quæsitum et inventum * quod ubi verbum invenisti, cavere pulchre scivisti. Impediti³ voce dicuntur qui balbutiunt, et contrarium est soluta et expedita voce multo melius apparuit *enodata*, quæsisse te arbitror ex eodem isto loco quod est ἀ-ὁ τοῦ ἐναντίου, quom imperfecta vox balbutientium sit, potuisse dici perfectam. Quæ ignoras <se te quom>⁴ *oculos convenientes* dixisti⁵ improbat hie locus ab <quia verbum varia> significatione est. Theodorus ἀπὸ τοῦ πολλαχῶς λέγεσθαι appellat. Nam convenire et decere et aptum esse et congruere Graeci ἡρμόσθαι appellant.

Non dubito alia item verba percensuisse. Nam <quom> straboni oculi dispaes sunt, potuisse te

¹ Eckst prefers *eloquentiae*. Uti is from Mai.

² In the lacunæ after *imbribus* about a quarter of a page would seem to be lost.

³ Naber prefers *iteratus*.

⁴ Quærit *impedita*.

⁵ A little more than a line is lost. J. W. L. Pearce suggests *quæ ignoras* <hinc se pe adhibenda sunt. Ex eo sonat igitur> *oculos*, etc.

⁶ Nine or ten letters lost.

this form of preciousness. In public speaking you have need to use the shield of Achilles, not wave a little target or scintilla with the sharp lances of the stage. Water gushes more daintily from little pipes than from the clouds

8 You spoke of *harmonizing eyes*¹. What applause, redoubled! for either word had been obviously sought after and found: and when you had found the word, you knew admirably how to use it with caution. Those who stammer² are said to have an impediment in their speech, and the contrary is the case with a speech free and unimpeded: much better clearly was your *tongue-united*. And I think you have gone to that same passage for an expression "drawn from the contrary," that, since the utterance of stammerers is imperfect, it was possible to speak of a *perfect* utterance. That you should have been unaware of this when you said *harmonizing eyes* this passage is found fault with (because the word is of a varied) meaning: Theodorus calls it the "method from synonyms"³. For the Greeks express to *agree*, to *fit*, to *suit*, to *harmonize* by the term ἡρμόσθαι (to be adapted).

I do not doubt that you passed in review other words also. For as in him who squints the eyes are not of a match, you could have called them equal or

¹ Marcus may have been alluding to himself and Lucius as the eyes of the state.

² See *De Floquentia* above, 3, § 1.

³ J. W. E. Pearce has suggested to me that this is the meaning of the words. A text book on rhetoric by Theodorus seems referred to, by the rules of which Fronto judges the expressions quoted. There were two rhetoricians of this name, one of Gadara, the other of Byzantium. For the latter see Cic. *Brut.* 12 (*in arte subtilior*).

THE CORRESPONDENCE OF

pares aut impares dicere; disconcinnos illos, hos concinnos dici potuisse, *concientes* multo melius.

9 Dicit fortasse *quid in orationibus meis noticiū, quid crispulum, quid luscum, quid purpurisso litum aut tumidum aut pollutum?* Nondum quicquam sed vereor¹ eas promo²

Anibr 343

10 Laudo Censoris factum, qui ludos talarios prohibuit, | quod semet ipsum diceret, quom ea praeteriret, dignitati difficile servire, quin ad modum crotali aut cymbali pedem poneret. Tum praeterea multa sunt in isto genere dicendi sinceris similia, nisi quis diligenter examinat. *Iusque datum sceleri*,³ M Annaeus ait, contra Sallustius *omne ius in validioribus esse*

11 Gallicanus⁴ quidam declamator, quom Macedones deliberarent, Alexandro morbo mortuo, an et Babylonem perverterent, *Quid si operas conduc<it>is leones?* inquit. Iste et superbe *Factum est*—eodem hoc verbo⁵ Enni—*robis lustra<is>*⁶ peroravit,⁷ *factum est, factum est opus*⁸ *inex<super>abile* Tiberis est, Tusce,⁹ Tiberis quem iubes claudi fiber amnis et dominus et fluentium circa regnator undarum,

¹ Six letters lost

² Three lines lost.

³ Cod. adds *eo*

⁴ For all the following passage see Hauler, *Zeitschr f d. öst. Gymn* lxi pp 673 ff.

⁵ Over this word is written in all(10) *gracioso sensu*

⁶ Or *in² ex alio Quiritibus* ⁷ Or *in² ex alio exclamant.*

⁸ Over *opus* is written *tum facinus perfecta canalis* and then *tali mole praestabilis*

⁹ Or possibly *Faus e* says Hauler The Tuscan must have canalised the Tiber

unequal, these accordant, those discordant; but harmonizing was much better

9 Perhaps you will say *what is there in my speeches new fangled, what artificial, what obscure, what patched with purple, what inflated or corrupt?* Nothing as yet,¹ but I fear

10 I praise the Censor's² act, who shut up the gaming houses because he himself, as he said, when he passed that way could scarce consult his dignity so far as to refrain from dancing to the sound of the castanets or cymbals. Then besides there are many things in that kind of oratory³ not unlike the genuine thing, if one does not look carefully into it. *Sanction granted to wrong*, says M. Annæus; on the other hand Sallust *all right rests with the stronger*

11 A certain Gallic rhetorician,⁴ while the Macedonians on Alexander's death from disease were debating⁵ whether they should utterly destroy Babylon also, says, *What if you have lions to do your work?* Grandiosely too he⁶ cries in his peroration, using the same word as Ennius, *By you citizens has been wrought, has been wrought a work unsurpassable*. It is the Tiber, O Tuscan,⁷ the Tiber that thou biddest be penned in the river Tiber, master and monarch of all

¹ This passage, if no other, makes impossible the suggestion of Mommsen that this treatise was written as late as 177. Fronto died, almost certainly in 166 or 167.

² It is not known who the Censor was.

³ The Senecan style.

⁴ Probably not Favonius the Gallic orator of Hadrian's circle who was a friend of Fronto's.

⁵ i.e. in the orator's show speech on the subject.

⁶ The Gallic orator.

⁷ Who the Tuscan was who canalised the Tiber is not clear, nor whether the whole of this is not another extract from the rhetorician.

THE CORRESPONDENCE OF

Innius <Factum 'st>: pos<t> aquam¹ <iam> consistit isti fluvius qui <est> omnibu' princeps,² qui sub oculis³ nit.

Peritia opus est ut vestem interpolam a sincera discernas. Itaque tutissimum est lectionibus eius modi abstinere. Facilis ad lubrica lapsus est.

12. Unum edictum tuum memini me animadvertisse, quo periculose scripseris vel indigna defecto aliquo libro. Huius edicti initium est *Florere in suis actibus inlibatam iuventutem*. Quid hoc est, Marce? Hoc [nempe dicere vis, cupere te Italici oppida frequentari copia iuniorum]. Quid in primo versu et verbo primo facit *florere*? Quid significat *inlibatam iuventutem*? Quid sibi volunt ambitus isti et circumfutiones? Alia quoque eodem edicto sunt eiusmodi. Revertere potius ad verba apta et propria et suo suco imbuta. Scabies porrigo ex eiusmodi libris concipitur. Monetam illam veterem sectator Plumbi nummi et cuiuscemodi⁴ adulterini in istis recentibus nummis saepius inveniuntur quam in vetustis, quibus signatus est Perperna vel Treba<nus> . . . Quid igitur? Non malim mihi

¹ m¹ postquam. Above these words is written *sensu* (or *veru*) *clero pr ssu*, and above that *retro ad arida*.

² For this line the Codex also gives *Etro iam subsistit fluvius*, etc., and *Constitit is fluvius qui e t princeps omnium aquarum*.

³ Over these words are written *Urbi Romae saxi Palatini inha' ita se firunt*.

⁴ Kluss would read *cuius quomod*.

circumfluent waters;¹ Ennius says: '*Twas wrought: after its flood now | stayed at the spot stood still that stream that is queen of all rivers, | which underneath the Ovilia*² (flows).

There is skill needed to distinguish a patched dress from a sound one. So the safest course is to eschew all such citations. It is easy to slip on the ice.

12. One edict of yours I remember to have noticed, in which you hazardingly wrote what would be even unworthy of some faulty book. The edict begins: *That there should flourish on their holdings*³ *unimpaired youth*. What is this, Marcus? What you wish to say is doubtless that you desire to see the Italian towns stocked with a plentiful supply of young men. What is *florere* doing in the first line and as the first word? What is meant by *unimpaired*⁴ *youth*? What is the object of these inversions and circumlocutions? Other faults of a similar kind are to be found in the same edict. Hark back rather to words that are suitable and appropriate and juicy with their own sap. The itch and the scurf are caught from books of that kind.⁵ Cleave to the old mintage. Coins of lead and debased metal of every kind are oftener met with in our recent issues than in the archaic ones which are stamped with the names of Perperna or Trebanius⁶. . . . What then? Am I not to prefer

¹ *cp. Verg. Aen. viii. 77.* He probably followed Ennius.

² The *Ovilia* was a place in the Campus Martius where the voting at the elections took place.

³ *Actus*, a certain measure of land (*see Plin. N.H. xviii. 17*).

⁴ Marcus (*Ad Caes.* i. 2 and v. 7) uses the word *illibatus* of *corpus* and *salus*, coupling it with *incolumis* in the latter case. Pius uses it in a rescript (*Inst. Inst.* i. 8, 2) with *patetere*. It appears, therefore, that its use with a personal subject was objectionable. ⁵ That is, like Seneca's.

⁶ See Index

THE CORRESPONDENCE OF

numinum Antonini aut Commodi aut Pii? Polluta <ista> et contaminata et varia et maculosa maculosioraque quam nutricis pallium. Omni ergo opera, si possit <fieri>,¹ linguam communem reddas, verbum aliquod requiras non fictum a te, nam id quidem absurdum est, sed usurpatum concinnius aut congruentius aut accommodatius.

13 *Tantum antiquitatis curaeque maioribus pro Italica gente fuit*, Sallustius ait. *Antiquitas* verbum usitatum, sed nusquam isto sensu usurpatum,² neque ideo probe placitum. Nam volgo dicitur, quod potius sit, antiquius esse. Inde prorsus³ ipsa <a> Sallustio derivata: et | quoniam minus clivum quod et minus usitatum verbum est, insequenti verbo interpretatus est, *antiquitatis curaeque*

Hoc modo municipes sacrorum
actus Quid vale poculum. In
ore⁴ plebis ad hoc pervolgatum est usque hoc genus
verborum, Accius, Plautus, Sallustius saepenumero,
etiam raro Tullius <usurpat>⁵

¹ Mai. He marks the word *communem* as doubtful.

² For this passage see Hauser, *Uien Stud.* 32, pt. 2.

³ Cod. *pro* s. Brakman prefers *probes*.

⁴ m¹ *aures*.

⁵ The lacunae cover more than a column.

¹ This mention of Caesar He was named
Caesar though
the fact could
not have Nor

for myself a coin of Antoninus or Commodus¹ or Pius? Those old words are stained and contaminated and discoloured and spotted, aye, more spotted than a nurse's apron. There is need, therefore, of all your pains to render your language, if possible, current coin, be ever on the look-out for some word, not one coined by you, for that, indeed, is an absurdity, but used by you more elegantly or more aptly or more happily than by others².

13 Says Sallust *Such reverent regard³ and affection did our ancestors have for the Italian race*. This word *antiquitas* is often used, but nowhere employed in that sense,⁴ and therefore is not properly correct. For it is commonly said that what is preferable is *antiquius*. Thence undoubtedly did Sallust derive his use of *antiquitas* itself, and, since a word that is less usual is also less clear, he interpreted it by means of the following word, *antiquitatis curaeque*.

In this way
 In the mouths
 of the people words of this kind have hitherto always
 been in vogue, Accius, Plautus, Sallust very often,
 even occasionally Cicero, (use them)

1922) thinks Folus of Ennius Verus may be meant. Perperna was consul 130 B.C. There is a coin of the *Gens Trebatia* extant, see Eckhel, v. 326 possibly a coin of C. before 172 is meant.

¹ Fronto says Follow the older writers. The Senecan style is as catching as the itch. There is purer metal in the older coins. What not prefer a coin of Antoninus? Of course the older words are worn and discoloured with age and want careful handling to justify their use.

² From Sallust's *Hist. Lib. I* says Hauser. Servius quotes the passage on Verg. *Georg. ii* 209.

⁴ Cicero seems to use it so.

THE CORRESPONDENCE OF

Ad Verum Imp li 2 (Naber, p 120)

<MAGISTRO meo salutem >

Ambr 422,
following
lat. 10

. . . .¹ <necessa>rio correctā vel in tempore
provisā vel celeriter curatā vel sedulo instructā, prae-
dicare ipse² apud te supersedi Da verecundiae
veniam, si urgentibus curis praepeditus negotia in
manibus praeversus sum, speque tuae erga me
benignissimae facilitatis interim in scribendo cessavi
Fiduciae amoris ignoscito, si piguit consilia me sin-
gularum rerum forsitan in dies mutanda sub incerto
adhuc exitu dubia existimatione perscribere Causam
quaeso tam iustae cunctationis accipias Cur igitur
alius quam tibi saepius? Ut breviter absolvam
quoniam quidem, nisi ita facerem, illi irascerentur,
tu ignosceres, illi tacerent, tu flagitares³ illis offi-
cium officio repensabam, tibi amorem pro amore
debebam⁴ An velles ad te quoque me litteris invi-
tum querentem festinantem, quia necesse erat potius
quam quia libebat, darem? Cur autem, inquires,
non libebat? Quia nequedum quicquam eiusmodi
effectum erat, ut te liberet ad gaudii societatem
vocare Curarum vero, quae me dies noctesque
miserrimum habuere, et prope ad desperationem
summae rei perduxere, facere participem hominem
carissimum et quem semper laetum esse cuperem

Ambr 421

1 m. 2 - . . .

the end of *Ad*
Cod 173a

¹ Verus is writing from Syria not long after his arrival at the seat of war, while the Parthians had not yet been definitely beaten

M CORNELIUS FRONTO

FROM LUCIUS VERUS TO FRONTO

163 A D

To my master, greeting

. . . I have refrained from relating to you myself all that had necessarily to be set right or provided for in good time, or quickly remedied or carefully arranged¹. Make allowance for my scrupulosity, if shackled with urgent cares I have dealt first with the business in hand and, counting on your good-natured indulgence towards me, have meanwhile given up writing. Pardon my reliance on our love if I have sought shy of describing my measures in detail, liable as they were to daily alteration and while the issue was still doubtful and all forecast precarious. Accept, I beseech you, the reason for so legitimate a delay. Why, then, write to others oftener than to you? To excuse myself shortly because, in fact did I not do so, they would be angry, you would forgive, they would give up writing, you would importune me, to them I rendered duty for duty, to you I owed love for love. Or would you wish me to write you also letters unwillingly, grumblingly, hurriedly, from necessity rather than from choice? Now why, you will say, not from choice? Because not even yet has anything been accomplished such as to make me wish to invite you to share in the joy. I did not care, I confess, to make one so very dear to me and one whom I would wish to be always happy, a partner in anxieties which night and day made me utterly wretched, and almost brought me to despair.

¹ Nazarius (*Paneg.* xxiv § 6) says that Varus in a panic offered the Parthian king terms which were scornfully rejected but he means Lucius Verus see p. 212

THE CORRESPONDENCE OF

hoc simili similis Feci prorsus compendium ita-
cris Lorum usque, compendium vite lubricae, com-
pendium elivorum ardiorum tamen vidi te non
exadvorsum modo sed locupletius, sive me ad dex-
teram sive ad laevam convertissem Sunt autem
dis iuvantibus colore sitis salubri, climore forti
Panem alter tenebat bene candidum, ut puer regius
alter autem cibarium, plane ut a philosopho pro-
gnatus Deos quaeso sit silvos sitor, silva sint sati
salva seges sit, quae tam similes procreet. Nam
etiam vocolas eorum audivi tam dulces tam venustas
ut orationis tue lepidum illum et liquidum sonum
nescio quo pacto in utriusque pipulo adgnoscerem
Iam tu igitur, nisi cives, superbiorem aliquanto me
experiere, habeo enim quos pro te non oculis modo
amem sed etiam auribus

Ad Antoninum Imp 1 4 (Naber p 101)

MAGISTRO meo salutem

lat 89

Vidi filiolos meos, quom | eos vidisti, vidi et te,
quom litteras tuas legerem Oro te, mi magister
ama me ut amas, ama me sic etiam quo modo istos
parvolos nostros amas nondum omne dix quod
volo ama me quo modo amasti Haec ut scriberem
tuarum litterarum mira iucunditas produxit. Nam

¹ The author of *De Differentiis Vocabulorum*—possibly
Fronto himself—explains *locuples* as a *copula locorum*. Fronto
means that he has been able to see Marcus without going to

M. CORNELIUS FRONTO

likeness I have absolutely taken a journey by short cut quite to Lorium, a short cut of the slippery road, a short cut of the steep ascents nevertheless I have seen you not only opposite to me but in more places than one,¹ whether I turned to the right hand or to the left God be praised they have quite a healthy colour and strong lungs One was holding a piece of white bread, like a little prince, the other a piece of black bread, quite in keeping with a philosopher's son I beseech the Gods to bless the sower, bless the seed sown, bless the soil that bears a crop so true to stock For even the sound of their little voices was so sweet, so winsome to my ear that I seemed, I know not how, to hear in the tiny piping² of either the clear and charming tones of your own utterance Now therefore, if you do not take care, you will find me holding my head a good deal higher, for I have those whom I can love instead of you, not with eyes only but with ears also

MARCUS TO FRONTO

163 A D

To my master greeting

I saw my little sons, when you saw them, I saw you too, when I read your letter I beseech you, my master, love me as you do love me, love me too even as you love those little ones of ours I have not yet said all that I want to say love me as you have loved me The extraordinary delightfulness of your letter has led me to write this For as to its

Lorium, where he apparently was, in the faces of his two children

¹ Cp ' Thy small pipe, Shaks Tw N : 4, 32.

THE CORRESPONDENCE OF

de elegantia quid dicam? nisi te Latine loqui, nos ceteros neque Graece neque Latine Domino meo fratri peto scriptites Valde volt ut hoc a te impetrem: desideria autem illius intemperantem me et violentum faciunt. Vale mi iucundissime magister Nepotem tuum saluta.

Ad Antoninum Imp i 5 (Naber, p 102).

ANTONINO AUGUSTO Domino meo

1. *Ante gestum, post relatum*, aiunt qui tabulas sedulo conficiunt. Idem verbum epistulae huic opportunum est, quae litteris tuis nuper ad me scriptis nunc demum respondet. Causa morie fuit quod, quom rescribere instituissem, quaedam menti meae se offerebant non *supino*, ut dicitur, *rostro* scribenda Dein senatus dies intercessit, et in senatu labor eo gravior perceptus, quod cum gaudio simul altius penetraverit, ita ut cum sole ventus Nunc haec epistula, quod non suo tempore praesto | adfuerit, veniam in dilationibus¹ usitatam poscit *ne fraudi sit*

2 Quom accepi litteras tuas, ita rescribere coeperam—*Ama me ut amas*, inquis Huic verbo respondere paulo verbis pluribus in animo est, prolixius enim rescribere tibi tempore illo solebam, quo

¹ Hiessling for Cod *relationibus*

¹ Fronto seems to mean that his reply, or payment of his debt, was not made at once but followed later, as the entry in the ledger follows the transaction

style what can I say? except that you talk Latin while the rest of us talk neither Latin nor Greek. Write often, I pray you, to the Lord my brother. He especially wishes me to get this from you. His wishes, however, make me unreasonable and exacting. Farewell, my most delightful of masters. Give my love to your grandson.

FRONTO TO MARCUS

163 A D

To my Lord Antoninus Augustus

1 *First done, then entered,*¹ say they who keep their books carefully. The same saying is applicable to this letter, which now at last answers your recent one to me. The reason of the delay has been that, when I made up my mind to write, some things came into my mind, which could not be written down *beak in air*, as the saying is. Then intervened the sitting of the Senate, and the labour it entailed was felt the more heavily in that, being simultaneous with my joy, it had taken deeper hold of me, just as the wind when combined with the sun.² Now this letter, as it was not forthcoming at its due time, asks the indulgence usual in postponements, *that it be without prejudice*.

2 When I received your letter, I began my answer thus—*Love me as you do love me*, you say. I propose to answer this phrase somewhat less briefly. For I used to answer your letters more at length in

² Does Fronto mean that as the wind finds freer entrance to our bodies when the sun has caused us to lay aside our wraps so toil makes itself more felt when joy has relaxed our energies?

THE CORRESPONDENCE OF

amatum te a me satis compertum tibi esse tute ostendis Vide, quæso, ne temet ipse defraudes et detrimentum amoris ultro poscas amplius enim tanto amari te a me velim credas mihi, quanto omnibus in rebus potior est certus præsens fructus quam futuri spes incerta Egone qui indolem ingenui tui in germine etiam tum et in herba et in flore dilexerim, nunc frugem ipsam maturae virtutis nonne multo multoque amplius diligam? Tum ego stolidissimus habear agrestium omnium omniumque aratorum, si mihi cariora sint sata messibus Ego vero <eorum> quæ optavi quæque vovi compos, optatorum votorumque meorum damnatus atque multatus sum in eam multam duplicatum amorem tuum defero,¹ non, ut antiquitus multas inrogari mos fuit, mille minus dimidio Assae nutricis est infantem magis diligere quam adultum, succensere etiam [pubertati stulta nutrix solet, puerum de gremio sibi abductum et campo aut foro traditum Litteratores etiam isti discipulos suos, quoad puerilia discunt et mercedem pendunt, magis diligunt Ego quom ad curam cultumque ingenui tui accessi, hunc te speravi fore qui nunc es, in hæc tua tempora amorem meum intendi Lucebat in pueritia tua virtus insita, luce

¹ Boissonade for *Cui* *desero*

¹ Cato (see Aul. Gell. vii 3 37) mentions this old law under which the fine for certain offences was limited to half a man's property less 1 000 (asses) Fronto says that all his wishes and prayers for Marcus having been abundantly ful

those days when, as you yourself shew, you were sufficiently assured of my love for you. Look, I beseech you, that you do not rob yourself, and of your own accord demand a diminution of love, for I would have you believe that you are so much more fully loved by me now, as in all things a present certain fruition exceeds an uncertain hope in the future. Shall not I, who loved the native quality of your genius even then, when in bud and in leaf and in flower, love now far far more deeply the very fruit of your matured excellence? Then should I be deemed the most blockish of all country swains and all ploughmen, if I valued what was sown above what was harvested. I indeed, being granted all that I wished and prayed for, have been cast and fined in my very wishes and prayers to meet that fine I put in my doubled love for you, not, as was the custom in old time for fines to be inflicted, at the rate of half less a thousand (asses)¹. A dry-nurse commonly loves a baby more than an older child, a foolish nurse is even prone to be angry with adolescence for taking away her boy from her arms and giving him over to the playground or the forum. Our instructors of youth too love their pupils more while they learn boyhood's lessons and pay their fees. When I was called to the care and cultivation of your natural powers, I hoped you would be what you now are, I carried my love on to these your present days. Conspicuous in your boyhood was your innate excellence, even more conspicuous was

filled, he is bound now to perform his part of the bargain and pay the fine due. To meet this liability he tenders his doubled love for Marcus and does not, as was the old custom, pay with less than half his assets.

THE CORRESPONDENCE OF

bit etiam magis in adolescentia sed ita ut quom
serenus dies inluculascit lumine inchoato Nunc iam
virtus integra orbe splendido exorta est et radius
disseminata: et¹ tu me ad pristinam illam mensuram
luciscentis amoris tui revocas, et iubes matutina
dilucula lucere meridie¹ Audi, quaeso, quanto am
pliore nunc sis virtute quam antea fueris, quo
facilius credas, quanto amplius amoris merearis et
poscere desinas tantundem

3 Ut a pietate contendere te tibi incipiam,
obsequia erga patrem tua pristina commemorabo,
eaeque cum praesentibus officiis comparabo Quis
ignorat, ubi pater tuus minus valeret, te iuxta
cum eo carere balneo, vino aqua etiam et cibo
temet deducere solitum² Nulla unquam te neque
somni neque vigiliae neque cibi | neque itineris
tua tempora habuisse sed patris temporibus in
servisse²

Ad Marcum Imp 1 6 10 Index only (Naber, p 93)

<MAGISTRO meo salutem> | Minus valui, mi magis
ter . .

<ANTONINO AUGUSTO Domino meo> Si ambulare
iam <poteris>³

<MAGISTRO meo salutem> Festino, mi magister,
<scribere>

¹ Klussmann for Cod *est*

² The last nine words are from the margin of Cod, except
that there the verbs are given in the indicative

³ Or perhaps *potero*.

M. CORNELIUS FRONTO

it in your youth; but in such a way as when a cloudless day begins to break with newly-dawning light. Now already your full excellence has risen with dazzling disc and spread its rays on every side: and yet you call me back to that bygone measure of my dawning love for you, and bid the morning twilight shine at noonday! Hear, I pray you, how much enhanced beyond your former is your present excellence, that you may more easily understand how much larger a measure of love you deserve, while you cease to claim only as much.

3 To begin my comparison of yourself to yourself with your dutifulness, I will mention your bygone devotion to your father,¹ and contrast it with your present attention to duty. Who does not know that, when your father was unwell, you used to discontinue baths in order to keep him company, deny yourself wine, even water and food, that you never studied your own convenience in the matter of sleep or waking or food or exercise, but sacrificed everything to your father's convenience?

FIVE LETTERS BETWEEN MARCUS AND FRONTO OF WHICH ONLY THE OPENING WORDS REMAIN

163 A D

To my master, greeting I have been unwell, my master

To my Lord Antoninus Augustus It you can walk yet

To my master, greeting I hasten to write, my master

¹ His adoptive father Pius. Marcus's *pietas* is also mentioned Capit. v. § 8, vii. § 2, and Dio, lxxi. 35

THE CORRESPONDENCE OF

<ANTONINO AUGUSTO Domino meo> Non reticebo

. . . .

<MAGISTRO meo salutem> Ego, mi magister,

. . . .

Ad Antoninum Imp ii 3 (Naber, p 106)

<MAGISTRO meo salutem >

Vat. 144
from a
new Q lat

. . . . <quom nihil magis explo>[ratum atque expeditum sit, mi magister, quam tua clemens in officis adversum te nostris interpretatio Scribe¹ igitur Domino meo pollicenti tibi multas suas litteras comperisse te ex me quae mandavit. Tum cetera adfectionis et comitatus tuae subnecte, mi magister, nam in litteris tuis, ut aequom est, adquiescit

Ego biduo isto, nisi quod nocturni somni cepi, nihil intervalli habui. quam ob rem nondum legere epistulam prolixio² Domino meo a te scriptam potui, sed crastinam opportunitatem avide prospicio Vale mi iucundissime magister Nepotem saluta

Ad Verum Imp ii 1 (Naber, p 119)

Ambr 446,
col. 2
ad med.

| DOMINO meo Vero Augusto salutem

1 Iam iam, Imperator, esto erga me ut voles utque tuus animus feret; vel tu me neglegito vel

¹ Naber for Cod *scribo*

² The following letter

¹ Lucius Verus, his colleague

² This long letter to Lucius in Syria was written on the victorious conclusion of the Armenian portion of the great Parthian war, when Lucius received the title *Armeniacus*. Besides flattering Lucius on the military successes, he praises the eloquence of his despatch to the senate. The rest of the letter is a glorification of eloquence, in which he includes all

M. CORNELIUS FRONTO

To my Lord Antoninus Augustus I will not hide from you

To my master, greeting I, my master

MARCUS ANTONINUS TO FRONTO

To my master greeting 163 A D

. . . . since nothing is more to be counted upon and more readily given, my master, than the kindly construction you put upon our services in respect to yourself Write then to my Lord,¹ who promises you many letters in return, that you have received his message from me Add also other tokens of your affection and good nature, my master, for he rests on them, as he has every reason to do

For the last two days I have had no respite except such sleep as I have got at night consequently I have had no time as yet to read your lengthy letter to my Lord, but I greedily look forward to an opportunity of doing so to morrow. Farewell, my most delightful of masters Love to your grandson

FRONTO TO LUCIUS VERUS

To my Lord Verus Augustus, greeting² 163 A D

1 From this moment, O Emperor, treat me as you please and as your feelings prompt you Neglect good literature, shewing its essential importance to the ruler and the general in the field Unfortunately the letter is much mutilated, and many interesting passages are only partially intelligible The last part is taken up with a comparison between Lucius's despatch and other historical documents of a similar character The picture of the demoralised army is given again in the *Principia Historiæ*, but the restoration of discipline was the work of Avidius Cassius and Martius Verus and the other generals.

THE CORRESPONDENCE OF

etiam spernito, nihil denique honoris impertito,
 <in> postremis,¹ al videbitur, habeto Nihil est ita
 durum aut ita iniurium, quod me² facere adversum,
 imbr 472 | al maxime velis, possis, quin ego ex te gaudis
 amplissimis abundem

Virtutes tuas bellicas et militaria facinora tua
 atque consulta me nunc laudare tu forsitan putes
 Quibus ego rebus, tametsi sunt pulcherrimae in rem
 publicam imperiumque populi Romani, optima
 amplissimae, tam<en> ut ego rebus laetandis viri
 lem pro ceteris portionem voluptatis capio, ex
 eloquentia autem tua, quam scriptis ad senatum
 litteris declarasti, ego iam hic triumpho

2 Recepti, recepi, habeoque teneoque omnem abs te
 cumulatam parem gratiam possum iam de vita laeto
 animo excedere, magno operae meae pretio percepto
 magnoque monumento ad aeternam gloriam relicto
 Magistrum me tuum fuisse aut sciunt omnes homines
 aut opinantur aut vobis credunt quod equidem
 parcius mihi met adrogarem, nisi vos ultro praedi
 caretis id quoniam vos praedicatis, ego nequeo
 negare

3 Bellicae igitur tuae laudis et adorea multos
 habes administratos, multaque armatorum milia unde
 que gentium accita victoriam tibi adnuntantur et
 adjuvant eloquentiae vir<tus>,³ ausim dicere, meo

¹ Pearce *extremis*

² Klussmann for Cod *mihi*

³ Hauler (*Hier Studien* 26 p 344) gives this as the reading
 of the Codex for *Mai s vero* Brakman gives *eloquentia tua*

me, or even despise me, in a word shew me no honour, put me, if you will, with the lowest. There is nothing you can do against me, however much in earnest you are, so harsh or unjust, that you should not be for me the source of the most abounding joys.

Perhaps you may think that it is your warlike qualities and your military achievements and strategy that I am now praising. True, they are most glorious for the state and Empire of the Roman people, none better or more magnificent, yet in rejoicing over them I but take my individual share of delight proportionably with others, but in the case of your eloquence, of which you gave such plain evidence in your despatch to the Senate, it is I who triumph indeed.

2 I have received, I have received, and I have and hold a full return from you in like measure heaped high. I can now depart this life with a joyous heart, richly recompensed for my labours and leaving behind me a mighty monument to my lasting fame. That I was your master all men either know or suppose or believe from your lips. indeed, I should be shy of claiming this honour for myself did you not yourselves both proclaim it. since you do proclaim it, it is not for me to deny it.

3 In your military glory and success you have many instruments, and many thousands of armed men called up from every nation under heaven spend themselves and lend their aid to win victory for you. but your supremacy in eloquence has been gained, I may make bold to say, under my leadership, O

but as Mai and Hauler see the letters *v* and *r*, it seems as if the reading may be *eloquen'ia vero tua*

THE CORRESPONDENCE OF

Ambr 431

Vat. 14

ductu, Caesar, meoque auspicio parta¹ est . |
 | . . spolia <regi>² Par
 thorum prompte et graviter respondisti Scilicet
 hoc te a centurionibus vel primipilaribus, elegantis
 simis altercatoribus, didicisse³ Dausara et Nicepho-
 r<1>um et Artaxata ductu auspicioque tuo armis capta
 sunt, sed arcem munitam et invictam et inexpugna-
 bilem, quæ in fratris tui pectore sita est, ad nomen
Armeniæ quod recusaverat sumendum, quis alius
 quam tu, aut quibus alius tu quam eloquentiæ copias
 adortus es⁴ Comitem tibi ad impetrandum adscisti
 exercitum, sed loquentem exercitum oratione pug-
 nantem In ea tu parte litterarum tuarum ut
 fratrem amantem decuit, sententis magis crebris⁵ et
 dulcibus usus es et verba modulatus collocasti, quas
 quom legerem—in senatu enim per valetudinem non
 potui adesse—quom eloquentia tua fratrem tuum
 urgeri viderem, ita cum tacitis cogitationibus meis
 compellabam *Quid hoc rei est, Antonine?* Nam tibi
 ideo nomen quod recusaveras accipiendum esse et de
 sententia decedendum *Quid nunc meæ, quid philoso-*
phorum litteræ agunt? Litteris militis vincimur *Ec*
*quid autem <parum>*⁴ *pulchre scripsisse videtur?* Num
 quod verbum insolens aut intempestivum? Aut num ego

Vat. 13

¹ m² has 1 at 1

² Eight lines are lost from the beginning of Vat 14

³ No convincing emendation of this unsatisfactory reading has been proposed *cp* however Cicero, quoted in Suet. *Cæs* 55

⁴ Kriusmann

⁵ See II 213

⁶ Dausara was near Edessa and Nicephorium on the

Caesar, and under my auspices
 Your answer to the Parthian king¹ was prompt and weighty. Of course you learnt this from your centurions or front rankers, those truly polished disputants! *Diusira* and *Nicephorium* and *Artaxata*² were taken by storm under your leadership and auspices, but that fortified and unconquered and impregnable citadel, which is planted in your brother's breast, against the assumption of the title *Armeniacus*,³ which he had refused, who other than you assaulted, and you with what other weapons than those of eloquence? You called in as your ally in winning your way an army, but a vocal army fighting with words. In that part of your letter, as befitting a loving brother, your thoughts were more closely packed and took a tenderer cast, and you arranged your words more rhythmically. When I read them—for I was too unwell to be present in the Senate—and perceived your brother to be hard pressed by your eloquence, I thus apostrophized him in my unspoken thoughts: *What do you say to this, Antoninus? I see that you will have to take the title which you have declined, and retreat from your resolve. What is the use now of my letters, what of the letters of philosophers? We are outdone by a soldier's letter. Is there anything, think you, less than admirable in the writing? any unusual or unseasonable word? Or do I seem to you to have trained a vain-*

Upper Euphrates in Mesopotamia. *Artaxata* was the capital of Armenia.

¹ *Capit. (Vit. Mar. ix § 2)* says this title was bestowed on both emperors after the successful campaign of *Statius Priscus* in Armenia in 163, but refused at first by *Marcus*. It appears on his coins late in 164, and he dropped it on the death of *Lucius* in 169.

THE CORRESPONDENCE OF

*tibi videor gloriosum militem erudisse? Quin, quod volu-
orinibus expetisti, habes fratrem fortem, "virum bonum
dicendi peritum": eadem enim dicit ille quae tu, sed ea
rurus nullus¹ ille quam tu*

4 Quom maxime haec ego mecum agitabam, ora-
tioni tue successit Antonini oratio—Di boni, quam
pulchra, quam vera multa¹ Plane dicta omnia et
verba delenifica pietate et fide et amore et desiderio
delibuta Quid <ergo? Utrum>² inter duos ambos³
meos, petito remne an unde peteretur, magis laud-
arem? Antoninus erat cum imperio obsequens, tu
autem, Luci, cum obsequio eras prae amore imperi-
osus Eas ego orationes ambis quom dextra laevaue
manu mea gestarem, amplior mihi et ornatior vide-
bitur diductus Eleusinae fuces gestantibus et regibus
sceptris tenentibus et quindecimviris libros adeun-
tibus, deosque patrios ita comprecatus sum *Hanno*
Iuppiter, te Liby<ae> deum, oro> . . | . deorum etiam
partim eloquentes se quam tacentes coli maluerunt
. . . . contumacia ego sinit pervica-
cibus eloquentia inveniatur Ne fulmen quidem
aeque terreret nisi cum tonitru caderet Ea ipsa
tonandi potestas non Diti Patri neque Neptuno ne-
que deis ceteris sed imperatori summo Iovi tradita
est, ut fragoribus nubium et sonoribus procellarum,

¹ *sc. verba*

² Mai fills the gap with *agerem tum*. Biakman reads the
Codex as *Q id<us> ver*

³ For the late Latin reduplication cp. II. 92, *antiqui veteres*.
Klassmann would read *amicos*

glorious soldier? Nay, you have what you have asked for in all your prayers, a brave brother, "a good man skilled in speaking" ¹ He says the same things as you, but expresses them more concisely than you

4 At the very moment, when I was turning this over in my mind following yours came the speech of Antoninus—Good heavens, how many admirable things, how many true! Every saying, every word quite fascinating, steeped in loyal affection and trust and love and longing What then? which of both my two friends, the petitioner or the petitioned, should I praise the more? Antoninus with all his imperial power was complaisant, but you, Lucius, with all your complaisance, were for very love imperious Carrying those two speeches in my right hand and my left, methought I was more honoured and more richly adorned than the priests of Eleusis carrying their torches, and kings holding sceptres in their hands, and the quindecimvirs opening the Sacred Books, and thus did I make my prayer to my ancestral ² Gods *O Jupiter Ammon, I beseech thee, Libya's God* some of the Gods also preferred to be worshipped as speaking rather than as silent the obstinate be inoculated with eloquence Even the levin bolt would lose half its terror did it not fall to the accompaniment of thunder That very power of thundering was not committed to Father Dis or to Neptune or to the other Gods but to their sovran emperor Jove, that by the crashing of clouds and the roaring of storms,

¹ A phrase found in the Elder Seneca (*Controv* 1) and Quint (*Inst* 1 pr) It apparently originated with Cato

² Fronto was a native of Cirta.

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t 30 velut quibusdam caelestibus vocibus, altissimum | imperium a contemptu vindicaret.

5 Igitur si verum imperatorem generis humani queritis, eloquentia vestra¹ imperat, eloquentia mentibus dominatur. La metum incutit, amorem conciliat, industriam excitat, impudentiam extinguit, virtutem cohortatur, vitia confutat, suadet, mulcet, docet, consolitur. Denique provocho audacter et condicione veteri omittite eloquentium et imperate, orationes in senatu habere omittite et Armeniam subigite. Alii quoque duces ante vos Armeniam subegerunt, sed una mehercules tua epistula, una tui fratris de te tuisque virtutibus oratio nobilior ad gloriam et ad posteros celebratior erit quam plerique principum triumphus. Vent dius ille, postquam Parthos fudit fugavitque, ad victoriam suam praedicandam orationem a C. Sallustio mutuatus est, et Nerva facta sui in senatu verbis rogatus² commendavit. Item plerique ante parentes vestros propemodum infantes et elingues principes fuerunt, qui de rebus militiae a se gestis nihil magis loqui possent quam galeae loquuntur.

6 Postquam respublica a magistratibus annuis ad C. Caesarem et mox ad Augustum translata est, Caesari quidem facultatem dicendi video | imperatoriam³ fuisse, Augustum vero saeculi residua elegantia⁴ et

nbr 412
d of
at. ii.

1 Hic a E. et al. 21 1 h. omnia a

2 1

3

4

as by some voice from heaven, he might safeguard his supreme sovereignty from contempt.

5 Therefore, if you seek a veritable sovereign of the human race, it is your eloquence that is sovereign eloquence that sways men's minds. It inspires fear, wins love, is a spur to effort, puts shame to silence, exhorts to virtue, exposes vices, urges, soothes, teaches, consoles. In fine, I challenge boldly and on an old condition—give up eloquence and rule; give up making speeches in the Senate and subdue Armenia. Other leaders before you have subdued Armenia, but, by heaven, your single letter, your brother's single speech on you and your merits will be as regards fame more ennobling, and as regards posterity more talked of, than many a triumph of princes. The famous Ventidius,¹ when he had defeated and dispersed the Parthians, to proclaim his victory borrowed a speech from C. Sallustius, and Nerva commended his acts in the Senate with words requisitioned from others. Moreover, most of the emperors that preceded your progenitors were virtually dumb and inarticulate, and were no more able to speak of their military achievements than could their helmets.

6 When the Commonwealth had been transferred from yearly magistrates to C. Caesar and anon to Augustus, I perceive, indeed, that Caesar's gift of speech was that of an imperator,² while Augustus was, I think, master of but the dying elegance of his

¹ Ventidius Bassus was enslaved as a child in the Social war. As legatus of Antony fifty years later he defeated the Parthians and attained the unique distinction of a triumph over them.

² *cp* Suet. *Caes* 55. Montaigne (i. 25) speaks of "the soldier like eloquence, as Suetonius calleth that of Caesar."

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Latinae linguae etiam tum integro lepore potius quam dicendi ubertate praeclitum patet. Post Augustum nonnihil reliquiarum iam et victarum et tabescentium Tiberio illi *superfluae*. Imperatores autem deinceps ad Vespasianum usque eiusmodi omnes ut non minus verborum puderet, quam pigeret morum et misereret facinorum.

7. Quod quis dicat, *non cum d'licerant*, cur ergo imperabant? Aut imperarent gestu censeo, ut histriones; aut nutu ut muti; aut per interpretem ut barbari. Quis eorum oratione sua aut senatum adfari, quis edictum, quis epistolam suismet verbis componere potuit? Quasi phrenitis morbus quibus implicatus est, aliena eloquentes imperitabant, ut tibiae sine ore alieno mutae erant.

8 Imperium autem non potestatis tantummodo vocabulum sed etiam orationis¹ est: quippe vis imperandi iubendo vetandoque exercetur. Nisi bene facta laudet, nisi perperam gesta reprehendat, nisi hortetur ad virtutem, nisi a vitis deterreat, nomen suum deserat et imperator frustra appelletur . . .

111 | partum² subdere nefarium, falsam pugnam deferre militare flagitium, testimonium falsum dicere capital visum est

9 veteris eloquentiae colorem adumbratum ostendit Hadriana oratio³ Osiris

¹ The marginal gloss is: <de> imperatore quoad sciens esse debet et litterarum.

² For the whole of this passage see Hauler, *Wien Stud* 25 pt 1, pp 162 ff. He says that he is reserving many other restorations in this letter for his forthcoming edition.

³ From the margin of Cod.

times and such charm as the Latin tongue still retained unimpaired, rather than of opulent diction. After Augustus a few relics only, withered already and decaying, were left over for the notorious Tiberius. But his successors without a break to Vespasian were all of such a kind as to make us no less ashamed of their speaking than disgusted with their characters and sorry for their acts.¹

7 But should one say *yes, for they had not been taught*, why, then, did they bear rule? That they might exercise it, I presume, either by gestures, like actors, or with signs like the dumb, or through an interpreter like foreigners. Which of them could address people or Senate in a speech of his own? which draw up an edict or a rescript in his own words? They ruled but as the mouthpiece of others, like men in the phrensy of delirium. they were as pipes that are only vocal with another's breath.

8 Now sovereignty is a word that connotes not only power but also speech, since the exercise of sovereignty practically consists in bidding and forbidding. If he did not praise good actions, if he did not blame evil doings, if he did not exhort to virtue, if he did not warn off from vice, a ruler would belie his name and be called sovereign to no purpose. . . . to foist in a changeling was accounted abominable, to publish a false bulletin a military crime, to give false witness a capital offence. . . .

9 Hadrian's speech affects a spurious pretence of ancient eloquence.² Osiris

¹ But Josephus (*Hist. of Jews*, xix. 3-5) and Tacitus (*Ann.* xiii. 5) speak highly of the eloquence of Caligula.

² For Hadrian's rococo tastes see Spart. *Hadrian* xvi. 5.

THE CORRESPONDENCE OF

nr 470

scilicet de facundia nullo taceo: lyrae impar appellatur | apparem, non darem deus ut allatum est.

10 Plerisque etiam indignis¹ paternus locus imperium per manus detulit: haud secus quam pullis, quibus omnia generis insignia ab ovo iam insita² sunt, cristae et plumae et crentus et vigilae, regum pueris in utero matris summa iam potestas destinata est: opstetricis manu imperium adipiscuntur

11 Inter Romulum et Remum diversis montibus augur<ntes aves de> rerum summa iudicaverunt. Et regnum Persarum equom seponet non cursu sed <equorum> priore hinnitu³ piritus non aquilae et non si

nr 470,
l 2, li e 11

12 | Insidias saepe aliorum et coniurationibus ademptum aliis imperium ad alios delatum scimus. Sed neque inventa eloquentia potest adimi neque morte adempta in alium transferri⁴. Tecum frater tuus iuste probitis⁵ facta Romuli |
nr 419
nr 418 |

13 *Iam Cato Hispaniam recuperabat, iam Gracchus locabat Asiam et Karthaginem virum dividebat*⁶

¹ For Cod. *indignus*

² The margin gives *praesto* for this word

³ From the margin but it is not clear where the sentence belongs. Naber gives further fragments from the text of Cod. *ea q <prae>dictus <rerum Romanarum> . . . prior* (Brakman *prior enim*) *nemo*

⁴ For what follows see Hauler, *Wien Stud* 93, Pt 1

⁵ *Quere probat ea*. Brakman reads the first three words of the sentence as *Ego miratus tuo*.

M. CORNELIUS FRONTO

. . . . of course I pass over the mule of eloquence.¹
 he is labelled as no expert at the lyre

.
 10 To many even unworthy sons the father's place has handed down the sovereignty: just as chicks have all the marks of their kind present in them even from the egg, namely combs and feathers and crowing and wakeful ways, so for the sons of kings even in their mother's womb is supreme power destined: they receive the sovereignty at the midwife's hand

11 Between Romulus and Remus, as they took the auguries on separate hills, birds decided the question of sovereignty, and one of the Persian kings (is said in old days to have gained) the kingdom not by a race but by priority in the neighing of his horse²

12 We know that the plots and conspiracies of others have often deprived one man of his sovereignty and handed it over to another. But eloquence when once found can neither be taken away, nor when taken away by death be transferred to another. With you your brother approves these deeds of Romulus

13 *Cato has already recovering Spain, Gracchus already farming Asia and parcelling Carthage out among individual settlers* Now, Marcus Iulius was

¹ There was a proverb *ὄνος λύρας*, "an ass at the lyre." *cp* Lucian, *De Merc. Cond* 25 *Dial. Meretr* 14; *Adv Ind* 4

² I have given the probable meaning of the mutilated passage, according to Naber's view of it; *cp* *Mm Felix, Octavius*, xviii 6, and see Herod iii 84

³ From the margin, and quoted, says Hauser, from Sallust, who he asserts is mentioned in the previous lacuna

THE CORRESPONDENCE OF

Anabr 417

Iam M Tullius summum supremumque os Romanae linguae fuit¹ | vellet, Cicero autem modulatus, vos utriusque gratiam sectantes meam moderantis viam vaditis²

14 Extant epistolae utraque lingua partim ab ducibus ipsis conscriptae, partim a scriptoribus historicarum vel annalium compositae, ut illa Thucydidis nobilissima Nicias ducis epistula ex Sicilia missa; item apud Gnaeum Sallustium ad Arsacem regem Mithridatis auxilium implorantis litterae crinosae, et Cn Pompeii ad senatum de stipendio litterae graves; et Adherbalis apud Cirtas astu³ obsessi invidiosae litterae, verum omnes, uti res postulabat, breves nec ullam rerum gestarum expeditionem continentes In hunc autem modum, quo scripsisti tu, extant Catuli litterae, quibus res a se iacturis atque damnis gestas ut lauro merendas⁴ historici exemplo exposuit, verum turgent <ea> elate prolata teneris prope verbis Historia tamen potius splendide perscribenda, si ad senatum perscriberetur, etiam caute Pollio Asinius iubilatus *Consiliorum* suorum si in formam epistolae contulisset necessario brevius et expeditius et den-

¹ From the margin

² For this passage see Hanler, *Versam d deutsch Philol* 50, an 1 II ten 11 id 31, Pt 1

³ Query arte (= aucto)

⁴ We seem to require *ornandas* (Pearce) or *laurum merentes*

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the chiefest and supreme mouthpiece of the Roman tongue . . . but Cicero more rhythmically ¹ both of you, aspiring to the charm of either, go the way that I guide you

14 There are extant letters in both languages, partly written by actual leaders, partly composed by the writers of histories or annals, such as that most memorable letter in Thucydides of the general Nicias² sent from Sicily, also in Gaius Sallustius, the letter full of invective from Mithridates to Arsaces³ the king, entreating his help, and the dignified despatch of Gnaeus Pompeius to the Senate touching his soldiers' pay,⁴ and the recriminatory letter of Adherbal while treacherously beleaguered at Ciria,⁵ but all, as the occasion required, short and without any description of events. In the style, however, of your letter there is extant a despatch of Catulus, in which he has set forth in the historical manner his own exploits, chequered with losses and failure, as deserving of the laurel crown. But there is a touch of bombast in these high flown periods, couched in words almost plaintive⁶. History, however, should rather be written in the grand style and, if written for the Senate, with restraint as well. If Asinius Pollio had thrown the jublations of his *Counsels* into the form of a letter, in a style necessarily terser, readier, and more compact, even if here and

¹ He is being contrasted probably with Cato

² Thuc vii 11-16 ³ Sallust *Hist* iv

⁴ *ibid* *Hist* iii The letter was from Spain, see Plutarch, *Life of Sertorius ad fin*

⁵ *ibid* *Bell* I, g 64 If *arte* be read translate *stratly*

⁶ *cp* Cic *Brut* 132 where he speaks of Catulus' book *De Consulatu et de rebus gestis suis* as written *mollis et Aeno phonteo genere sermonis*.

THE CORRESPONDENCE OF

sus, si quod interdum respondit¹ inornatus, scripsisset melius †

Ambr. 408 15. Tunc litterae et eloquentes sunt ut oratoris, strenue ut ducis, graves ut ad senatum, ut de re militari non redundantes. Nam neque eius de brevitatis cortatis fuit. Quis imperator, <ali>quid² ad senatum quom debet loqui, epistulam scriberet? Inque tibi facultas de quibus scribendum erit quom dum se denique cum iam uti sicut prius quumquam prov ad populum dicere et quod vos exercitus insuper aut meo non ipse vel quod nos vel quod. So hremo potius quam Vologreso regnum Armeniae dedisset, aut quod Pacorum regno privasset, nonne³ oratione huiusmodi explicari vis atque Nepos de re Numantina id epistula eo minore vi, *Bello insupra undique viri e nationibus adducti Hispaniae aderant*

Ambr 407 . . . | operam gestantes scriptae

Ambr 406 16 . . . *Summum eloquentiae genus est de sublimibus magnifice, de tenuibus frugaliter dicere*⁴ | solitum

Ambr 405 | . . . ego huc re

¹ Pearce suggests *res poscit*. We should at least expect *respo di set*. ² Niebuhr

³ What follows is Hauser's restoration of the text from the Codex

⁴ From the margin of Cod. The words are Cicero's (*Orat* 29). *Solitum* is also from the margin

¹ For Pollio's style see Seneca, *Ep* 100, 7. Marcus took a dislike to this author, see i. p. 140

there he did make some answer with a want of finish, he would have written better.¹

15. Your letter is both eloquent, as being an orator's, strenuous, as being a general's, dignified, as to the Senate, and, as on a matter military, not overloaded. For neither

. What imperator, when it is his duty to say something to the Senate, would write a letter? You, having no opportunity (of speaking to them) about which you had to write

.

. that he had given the kingdom of Armenia to Sohemus² rather than to Vologresus, or that he had deprived Pacorus³ of his kingdom, do you not wish this to be set forth in a speech after the manner in which Nepos on the Numantine affair described it in a letter so much less forcibly, thus *in the above-mentioned war men drann from all the nations of Spain were present*

.

16 *The supremest eloquence is to speak of sublime things in the grand style, of homely things in simple language*

.

¹ A coin of Lucius, A.D. 164, with legend *LEX ARMINIUS DATUS* (Cohen, iii. 159 Plate 1), shews us Lucius giving Sohemus the crown. He had been driven from his kingdom by the Parthians, and became senator and consul at home, for which see Iliotius, 94.

² A sarcophagus with an inscription by this Aurelius Pacorus to his brother is extant. See *Cypr. Inscr. Græc.* 3559. Vologresus had made him king of Armenia.

THE CORRESPONDENCE OF

vicum ubi eos apud ab
eloquentia viso neque officii obres
. . . . quam philosophiam nihil quid-
dem sumpsit se valent Hinc quae
. . . . magis minusve ut principio incre-
pandum, ut post principia ubi gradus
habemus eloquentia per¹ quando

17 Etiam Variathus etiam Spartacus belli scientes
et manu prompti fuere Sed enim omnes uni-
versos, quicumque post Romam conditam oratores
extiterunt, illos etiam quos in *Bruto* Cicero eloquen-
tiae civitate gregatim donavit, si numerare velis, vix
trecentorum numerum complebis, quom² ex una
Fabiorum familia trecenti milites fortissimi pro
patria dimicantes uno die occubuerint Non genti-
um multa nulla sub pellibus unum
etiam quem tu | . . . asinus³
. . . . ad summam eloquentiae ubi res
postulat, sive de re submittere⁴ <orationem>
. . . . | . . . frustra sed ad . . . fidei com-
memoratae Ceteros ars ac opes quo
. . . . binos egenum meminisse⁵

18 His te consilus, Imperator, a prima pueritia
tua non circus⁶ profecto nec lorica sed libri et litter-
arum disciplina imbuebant Quom multa eiusmodi
consiliosa exempla in historicis et in orationibus lecti-
tares, ad rem militarem magistra eloquentia usus es

¹ Fourteen letters, of which the last three are *dum*.

17. Even Viriathus¹ and even Spartacus² were skilled in war and quick to strike. But indeed, if you wish to count up the full tale of all the orators, as many as have existed since the foundation of Rome, including those whom Cicero in his *Brutus* endowed wholesale with the franchise of eloquence, you will scarcely make up the number of three hundred all told, while from one family of the Fabii there fell fighting for their country in one day three hundred soldiers, the bravest of the brave. Not of races many thousands

. to the height of eloquence where the subject calls for it or to speak on a matter in a lower key

18 It was surely, Imperator, not the circus or the breastplate that instilled these wise ideas into you from your earliest boyhood, but books and training in letters. When you read many instances of this kind, fruitful of wise suggestion, in histories and speeches, you used eloquence as your mistress in the art of war.

¹ A Lusitanian guerilla chief (147 B.C.) who defied the Romans for many years

² A Thracian slave and gladiator who raised an insurrection and held out in Italy itself for two years 73-71 B.C.

19 Exercitus tibi traditus erat luxuria et lascivia et otio diutino corruptus Milites Antiochiae assidue plaudere histrionibus consueti, saepius in nemore¹ vicinae ganeae quam sub signis habiti Equi incuria horridi, equites volsi raro brachium aut erus militum hirsutum Ad hoc vestiti melius quam armati, adeo ut vir gravis et veteris disciplinae Laelianus Pontius loricas partim eorum digitis primoribus scinderet, equos pulvillis instratos animadverteret, | iussu eius cornicula consecuta, a sedilibus equitum pluma quasi anseribus devolsa Pauci militum equum sublimitus insilire, ceteri aegre calce genu poplite erepere,² haud multi vibrantes hastas, pars maior sine vi et vigore tamquam lanceas³ iacere Alea in castris frequens, somnus pernox aut in vino vigilia

20 Huiusmodi milites quibus imperius contineres et ad frugem atque industriam converteres, nonne te Hannibalis duritia, Africana disciplina, Metelli exempla lustoris perscripta docuerunt? Ipsum hoc tuum a te diutina prudentia consultum, quod non ante signis conlatis manum cum hostibus conseruisti quam levibus proelus et minutis victoris militem

¹ Cornel suggests *n dore*, from Cic *In Pis* 6

² Klussmann for Cod *repere*

³ Jordan for Cod *lanceas*

¹ *cp* below *Princ H st ad med* and *Ad Am* 1 6

² *cp* Lucian *De Salt.* οἱ Ἀντιοχεῖς . . . πόλιν ἑρχομένων
μάλιστα πρεσβεύουσα

19 The army you took over was demoralized with luxury and immorality¹ and prolonged idleness. The soldiers at Antioch² were wont to spend their time clipping actors, and were more often found in the nearest cafe garden than in the ranks. Horses shaggy from neglect, but every hair plucked from their riders—a rare sight was a soldier with arm or leg hairy. Withal the men better clothed than armed, so much so that Pontius Lælianus,³ a man of character and a disciplinarian of the old school, in some cases ripped up their cuirasses with his finger tips, he found horses saddled with cushions, and by his orders the little pommels on them were slit open and the down plucked* from their pillions as from geese. Few of the soldiers could vault upon their steeds, the rest scrambled clumsily up by dint of heel or knee or ham, not many could make their spears hurtle, most tossed them like toy lances without verve and vigour. Gambling was rife in camp, sleep might long, or, if a watch was kept, it was over the wine cups.

20 By what disciplinary measures you were to break in soldiers of this stamp and make them serviceable and strenuous did you not learn from the dourness of Hannibal, the stern discipline of Africanus, the exemplary methods of Metellus,⁴ of which histories are full? This very precaution of yours, a lesson drawn from long study, not to engage the enemy in a pitched battle until you had seasoned your men with skirmishes and minor successes—did you

¹ We know his *cursus hororum* from *Corp. Inscr. Lat.* vi 1549.

⁴ Probably Q. Caecilius Metellus, called *Murilcus* who conducted the war against Jugurtha in 109 B.C., see below Sallust, quoted *Ad Anon.* ii 6.

imbueres, nonne Cato docuit orator idem et imperator summus? Ipsa subieci Catonis verba, in quibus consiliorum tuorum expressa vestigia cernebas. *Interea unamquamque turmam manipulum cohortem temptabam, quid facere possent proelius lenibus¹ spectabam cuius modi quisque esset si quis strenue fecerat, donabam honeste, ut alii idem vellent, atque in contione verbis multis laudabam. Interea aliquot pauca castra feci, sed ubi anni tempus venit, castra hiberna <constitui>* |

Catonis imaginem de senatu proferri solitam memoriae traditum est si ob militaria facinora, cur non Camilli? cur non Capitolini? cur non Curii aliorumque ducum?²

Ad Verum Imp II 7 (Naber, p 133)

| VERO AUGUSTO DOMINO meo

1 Quanta et quam vetus familiaritas mihi intercedebat cum GAVIO CLARO meminisse te, Domine arbitror. Ita saepe de eo apud te ex animi mei sententia sum fabulatus. Nec ab re esse puto memorem te tamen admonere.

2 A prima aetate sua me curavit Gavius Clarus familiariter non modo iis officiis, quibus senator vetate et loco minor maiorem gradu atque natu senatorem probe colit ac promeretur, sed paulatim amicitia

¹ Mai for Cod *lenibus*

² All this from *Catonis* is from the margin of Cod. A gloss also ad *la tres triumphs de Africanis* (Mai)

not learn it from Cato, a man equally consummate as orator and as commander? I subjoin Cato's very words, in which you can detect the express counter part of your measures. *Meanwhile I tested each separate squadron, manipule, cohort, to gauge its capabilities. By little combats I found out the calibre of each man: if a soldier had done gallant service I rewarded him handsomely, that others might have a mind to the same, and in my address to the soldiers I was profuse in his praise. Meanwhile I made a few encampments here and there, but when the season of the year came round, I established winter quarters*¹. . . tradition tells us that Cato's bust used to be carried forth from the Senate: if by reason of his military exploits, why not the bust of Camillus? why not of Capitolinus? why not of Curius and other generals? . . .

FRONTO TO LUCIUS VERUS

163 A D

To my Lord Verus Augustus

1 How great and long standing is the intimacy which subsisted between me and Gavius Clarus is well known, I think, my Lord, to you. So often have I spoken of him from the fulness of my heart before you. Nor does it seem to me amiss to remind you of this, well as you remember it.

2 From his earliest years Gavius Clarus devoted himself to me as a personal friend, not only in those good offices with which a senator, lesser in age and rank, rightly honours and deserves well of another senator, higher in rank and older than himself. But gradually our friendship reached such a

¹ From an unknown work of Cato

nostra eo processit ut neque illum pigeret nec me puderet ei illum oboedire mihi, quae clientes, quae liberti fideles ac laboriosi obsequuntur nulla hoc aut mea insolentia aut illius adulatione, sed mutua caritas nostra et amor verus ademit utrique nostrum in officiis moderandis omnem detrectationem Quid ego memorem negotia in foro nostra minima maximeque ab eo curata? aut domi quomodo¹ uspiam recte clausum aut opsignatum aut curatum aut confectum quid velim, me uni huic mandasse et concedisse

An br 424

3 Sed, quod alumnus meus aegre toleraret, valetudini meae curandae ita semper studuit, tantam omni tempore etiam operam dedit, ut excubaret etiam aegro mihi et, ubi meis ego uti manibus per valetudinem non possem, manu sua cibos ad os meum adferret Postremo, si quid humanitas, absente Victorino et domino fratre meo, mihi accidisset, huic iusta corpori meo curanda mandavi Praesentibus etiam illis ab hoc potissimum corpus meum contrectari volui quo minus doloris ad fratrem et generum meum ex contactu ullo corporis mei perveniret.

4 Haec mihi cum GAVIO Claro iura sunt Immo ego, si res familiaris mihi largior esset, ne quid ad senatoris munia facile toleranda deesset, omni <ei>² ope subvenirem, neque umquam ego huius negotii causa eum trans mare proficisci paterer Nunc et

¹Haupt for Cod. *quod*.²Hen dorf

stage that, without dislike on his part or shame on mine, he could pay me the deference of a client, the respect that is shewn by faithful and diligent freedmen: this not from any arrogance on my part or servility on his, but our mutual affection and genuine love did away with any reluctance for either of us in the regulation of our duties. What need for me to mention his attention to my affairs in the forum, the least equally with the greatest; or at home, when I wished anything anywhere duly closed or sealed or attended to or completed, how I entrusted and confided it to him alone.

3 But, though my foster child would hardly shew such complaisance, he always devoted such attention to my health, was so unsparing, too, at all times of himself, that when I was sick he even sat up with me, and when rheumatism deprived me of the use of my hands he was wont to put the food to my mouth with his own hand. Lastly, I commissioned him to see to it that my body had its due rites, if in the absence of Victorinus and my good brother anything happened to me such as must to all men. Even if they should be on the spot, I wished my body to be handled by him rather than by any other, that my brother and my son-in-law might be spared the pain of touching my body.

4 These are the terms on which Gavius Clarus and I stand. Now, if my means were more ample, I would help him to the utmost of my power to enable him to discharge the duties of a senator in comfort, nor should I ever allow him to cross the sea on his present errand. As it is, both the moderate

THE CORRESPONDENCE OF

nostrae res haud copiosae et huius paupertas artior me compulerunt, ut eum invitum expellerem in Suriam ad legata, quae ei in testamento hominis amicissimi obvenerunt, persequenda.

Ambr 423 5 Quae paupertas Claro meo nulla ipsius culpa optigit, | sed neque paterna ulla neque materna bona fruenda percepit eaque sine heres patris fuit, ut creditoribus paternis aegre satisfaceret Ceterum parsimonia et officinis et frugalitate onera quaestoria et aedilicia et praetoria perfunctus est. Cui¹ quidem per absentiam eius divus pater vester sumptum prae-turae de fisco vestro quom expendisset, ubi primum in Urbem Clarus reconciliata sibi valetudine rediit, omne fisco vestro persolvit

6 Nihil isto homine officiosius est, nihil modestius, nihil verecundius, liberalis etiam, si quid mihi credis, et in tanta tenuitate, quantum res patitur, largus Simplicitas, castitas, veritas, fides Romana plane, φιλοστοργία vero nescio an Romana, quippe qui nihil minus in tota mea vita Romae repperi quam hominem sincere φιλοστοργον ut putem, quia reapse nemo est² Romae φιλοστοργος, ne nomen quidem huic virtuti esse Romanum

7. Hunc tibi, Domine, quantis possum precibus

¹ Heindorf for Cod *cum*.

² Naber for Cod *sic*.

nature of my means¹ and his straitened circumstances have forced me to banish him against his will into Syria to secure the legacies which have come to him under the will of a very dear friend

5 This want of means has been the lot of my friend Clarus from no fault of his own, for he received no benefit from either his father's or his mother's estate, the only result of his being his father's heir was that he found difficulty in paying his father's creditors. But by economy and attention to duty and frugality he discharged all his obligations as quaestor, aedile, and praetor, and whereas your deified father paid out from your privy purse² the expenses of his praetorship in his absence, as soon as ever Clarus recovered his health and came back to Rome he paid in the whole amount to the imperial treasury

6 Nothing can be more conscientious than the man, nothing more reasonable, nothing more unassuming, generous also, if I am any authority, and considering the slenderness of his resources as open handed as his means permit. His characteristics, simplicity, continence, truthfulness, an honour plainly Roman, a warmth of affection,³ however, possibly not Roman for there is nothing of which my whole life through I have seen less at Rome than a man unfeignedly φιλοστοργος. The reason why there is not even a word for this virtue in our language must, I imagine, be, that in reality no one at Rome has any warm affection

7 This is the man, my Lord, whom I commend to

¹ Yet according to Aul. Gellius he could spend more than £3 000 on a bath (Gell. xix. 10, § 4)

² cp. Capit. Pul. l. ii. viii. 4

³ Especially between parents and children. See i. p. 281 and Marcus *Thoughts*, i. 11, and Justinian, *Inst.* ii. 18 pr.

THE CORRESPONDENCE OF

commendando Si unquam me amasti sive amaturus
unquam es, hunc a me fidei tunc atque opi traditum
tuearis peto Quæris fortasse quid pro eo <ut
facias rogare velim>

Ad Antoninum Imp II 4 (Naber, p 106)

Vat 144,
CL 2

| MAGISTRO meo salutem

Quom salubritas ruris huius me delectaret, sen-
tibriam non medioere illud mihi deesse, uti de tua
quoque bona valetudine certus essem, mi magister
Id uti suppleas, deos oro Rusticatio autem nostri
μετὰ πολιτείας prorsus negotium illud est vitæ togatæ
Quid quaeris? hanc ipsam epistulam paululum me
pergere non sinunt instantes curæ, quarum vacatio
noctis demum aliqua parte contingit Vale mi iucun-
dissime magister

Vat. 143

Ciceronis epistulas, si forte | electas totas vel dimi-
diatis habes, impertias, vel mone quas potissimum
legendas mihi censeas ad facultatem sermonis foven-
dam

Ad Antoninum Imp II 5 (Naber, p 107)

DOMINO meo

Quintus hic dies est ut correptus sum dolore
membrorum omnium, præcipue autem cervicium et
inguinum Memini me excerpisse ex Ciceronis
epistulis ea dumtaxat, quibus inesset aliqua de elo-
quentia vel philosophia vel de republica disputatio,
156

M CORNELIUS FRONTO

you with the strongest appeal possible If ever you have loved me, or wish ever to love me, I beg that you will befriend him whom I commit to your trust and protection Perhaps you will ask what I wish you to do for him

MARCUS ANTONINUS TO FRONTO

163 A D

To my master, greeting

While enjoying this health giving country air, I feel there is one great thing lacking, the assurance that you also are in good health, my master That you make good that defect is my prayer to the Gods But this country holiday of mine saddled with state business is, in fact, your busy city life still In a word I cannot go on with this very letter for a line or two owing to pressing duties, from which I enjoy a respite only for a part of the night Farewell, my most delightful of masters

If you have any selected letters of Cicero, either entire or in extracts, lend me them or tell me which you think I ought particularly to read to improve my command of language

FRONTO TO MARCUS ANTONINUS

163 A D

To my Lord

This is the fifth day since I have been seized with pain in all my limbs, but especially in my neck and groin As far as I remember I have extracted from Cicero's letters only those passages in which there was some discussion about eloquence or philosophy or politics, besides, if there seemed to be

THE CORRESPONDENCE OF

praeterea si quid elegant¹ aut verbo notabili dictum videretur, excerpti Quae in usu meo ad manum erant excerpta, misi tibi Tres libros, duos ad Brutum, unum ad Axiū, describi iubebis, si quid rei esse videbitur, et remittes mihi, nam exemplares eorum excerptorum nullos feci Omnes autem Ciceronis epistulas legendas censeo, mea sententia vel magis quam omnes eius orationes Epistulis Ciceronis nihil est perfectius

Ad Antoninum Imp 11 6 (Naber, p 107)

DOMINO meo Fronto

Vat. 157 1 . <facili>|tatem² historiae aptam neque illam moderationem orationi accommodatam, figuras etiam, quas Graeci σχήματα vocant, illum historiae, hunc orationi congruentes adhibuisse, Sallustium antithetis honeste compositis usum *alieni appetens, sui profusus, satis eloquentiae, sapientiae parum*, par onomasia etiam non absurda neque frivola sed proba et elegant³ *Simulator ac dissimulator*, Tullium vero commotissima³ et familiari oratoribus figura usum, quam scriptores artium *επαναφοραν* vocant⁴

2 *Quis clarioribus viris quodam tempore iucundior? quis turpioribus coniunctior? quis civis meliorum partium*

¹ Query *elegantius*

² Or <ubr>|tatem There is a gap in the Codex here of twelve pages says Naber, the last being Vat 158 The fragments he gives at the beginning of the letter do not seem to belong to it.

³ Naber Mai reads *commotissima*

⁴ Four lines are lost

any choice expression or striking word I have extracted it. Such of these as were by me for my own use I have sent to you. You might, if you think it worth while, have the three books, two to Brutus and one to Aulus, copied and return them to me, as of these particular extracts I have made no copies. All Cicero's letters, however, should, I think, be read—in my opinion, even more than his speeches. There is nothing more perfect than Cicero's letters.

FRONTO TO MARCUS ANTONINUS

FRONTO to my Lord ¹

163 A D

I . . . a facility adapted to history, and not that restraint which is suitable for oratory, that these authors² employed figures of speech also, which the Greeks call *σχηματα*, the former those which are in keeping with history, the latter with oratory, that Sallust made use of antithesis happily arranged *greedy of another's wealth, lavish of his own, eloquence enough, too little wisdom*,³ of word echo, too, and that not ridiculous or trivial but judicious and in good taste *expert in simulation and dissimulation*,⁴ that Tullius, however, made use of a most passionate figure, and one well known to orators, which grammarians call *epanaphora*.⁵

2 *Who on occasion more delightful to our nobler men? Who more intimate with the baser? Who at*

¹ This letter contrasting the characteristics of history and oratory in the matter of style preserves for us long extracts from Sallust which would have been greatly appreciated if Sallust's works had been totally lost. It has not been thought necessary here to give the extracts in full.

² Sallust and Cicero.

³ Sallust, *Catil.* 5.

⁴ Sallust, *ibid.*

⁵ i.e. repetition of an emphatic word.

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Ad Antoninum Imp. li. 6 (Naber, p. 107)

DOMINO meo FRONTO

L. 157

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FRONTO TO MARCUS ANTONINUS

FRONTO to my Lord ¹

163 A D

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² Sallust and Cicero

³ Sallust, *Catal* 5

⁴ Sallust, *ibid*

⁵ i.e. repetition of an emphatic word

THE CORRESPONDENCE OF

aliquando? quis tetrior hostis hunc civitati? quis in voluptatibus inquinatior? quis in laboribus patientior? quis in rapacitate avarior? quis in largitione effusior? Et octo¹ deinceps ab eodem isto verbo sententiae inchoantur Si videbitur, id quoque animadvertito et cum animo tuo cogitato,² an pro cetero ornatu ac tumultu me[di]um illud inculpatum sit, cum omnibus communicare quod habebat, nam mihi paulo hoc volgatius et ieiunius videtur

at. 1671

3 Non <prorsus ineptum> post illa Sallustii et Tullii de Catilina <quod> L. Antoni<us> <. . . >ut³ ait putabam ostendere <quem exercitum> praeter veteranum <alacri ardo>re magna pars iuventutis sequebatur Idcirco hoc in schemate tu faceres idem quod pictor, qui numquam equom pingere <re conatus esset> pro . . .⁴ pingit .

4 Iugurthae forma huiusmodi est

Qui ubi primum adolevit, pollens viribus, decora facie, sed multo maxime ingenio validus, non se luxu neque inertiae corrumpendum dedit, sed uti mos gentis illius est equitare iaculari cursu cum aequalibus certare, et quom omnes gloria anteiret, omnibus tamen carus esse Ad hoc pleraque tempora in venando agere, leonem atque alias feras primus aut in primis ferire, plurimum facere, minimum de se loqui⁵ Nam Iugurtha, ut erat

¹ For Cod porro if this be kept, read quot porro

² Klussmann for quod animadvertit de te . . . citato (Mai and Naber)

³ Query L. Annaei s. Cornutus, a historian of Livy's time who is confused by Suidas with the philosopher of the same name

⁴ About a hundred letters are lost

⁵ First extract to loqui is complete Of the second from Nam Iugurtha only about one sixth is given

M. CORNELIUS FRONTO

times on the good side in politics? Who a fouler enemy to this state? Who more polluted in his pleasures? Who more enduring in his labours? Who more greedy in his rapacity? Who more lavish in his prodigality? Even eight sentences in succession begin with the same word. Notice this also, if you will, and turn it over in your mind whether, compared to all the embellishment and passion, that neutral phrase—to share what he had with all¹—be not a blemish; for to me this seems a little too dry and commonplace.

3. After those passages of Tullius and Sallust on Catiline I thought it not wholly irrelevant to exhibit what L. Antonius says: *whom besides a veteran army a great part of the young men followed with eager enthusiasm*. Therefore, in using this figure you would do just what a painter, who had never tried to paint a horse

4. The sketch of Jugurtha is as follows:

As soon as he grew up, endowed with bodily strength, a handsome person, but above all with a powerful intellect, he did not give himself up to the seductions of luxury and idleness, but, as is the way with that nation, rode, threw the dart, and challenged his peers in the race; and though he outstripped all in glory, yet was he a favourite with all. Besides he spent much time in the chase and was the first, or among the first, to strike the lion or other wild beasts, and doing the most he still said the least about himself.²
 For Jugurtha, possessed as he was of a vigorous

¹ Cicero, *Pro Cael.* 6. The passage continues: *Illa vero iudices, in illo homine mirabilia fuerunt, comprehendere multos amicitia, lueri obsequio; cum omnibus communicare quod habebat; servire temporibus omnium suorum, etc.*

² Sallust, *Jug.* 6, § 1.

THE CORRESPONDENCE OF

Ambr 82 *imp'igro atque acri ingenio, ubi naturam P. Scipionis, qui tum Romanis imperator erat et morem hostium cognovit magis quam honesti*¹

5 Artes imperitorie honore summo habitae
 . . . quid . . . sperent ab per . . . tibi natura
 . . . is . . . qui tum . . . rem omnia²

Ambr 81 6 |Ne acri quidem formi prietereunda.

Mare saevum, importuosum, ager frugum fertilis, bonus pecori, arbori infecundus, caelo terraque penuria aquarum Genus hominum salubri corpore, velox, patiens laborum, ac plerosque senectus dissolvit, nisi qui ferro aut bestis interiere, nam morbus haud saepe quem <quam> superat Ad hoc malefici generis plurima animalia

7 Tum ille persequitur non inscite

In regnum Adherbalis animum intendit ipse acer, bellikosus, at is quem petebat quietus, imbellis, placido ingenio, opportunus iniuriae, metuens magis quam metuendus

8 Hoc de consulis peritia

Nam in consule nostro multae bonaeque artes et animi et corporis erant, quas omnes avaritia praepediebat, patiens laborum,³ acri ingenio, satis providens, belli haud ignarus, firmissimus contra pericula et insidias⁴

9 Milites deinde corrupti

Exercitus imperatori traditur a Spurio Albino proconsule iners, imbellis, neque periculi neque laboris patiens, lingua quam manu promptior, praedator ex socis et ipsa

¹ For all these Sallust extracts see Hauler, *Phoen Mus* 54 Pt 2 (1899) pp 161-170 The extract from Ambr covers four pages (Naber)

² Naber says Ambr 82 begins at *Artes*

³ Cod. *laboris* ⁴ m² of Cod for *insidias*

and eager character, when he came to know the temper of P. Scipio, who was then the Roman general, and the ways of the enemy . . . rather than respected ¹

5 The qualities of a general held in the highest honour

6 Nor must the sketch of the country be left out.

The sea is stormy and harbourless; the country fruitful in grain, good for cattle, but not kindly for trees, there is a scarcity of water from rain or springs. The inhabitants are healthy in body, active, inured to toil, the majority succumb to old age, unless they perish by violence or wild beasts, for disease seldom claims a victim. It must be added that noxious animals abound ²

7 Then he goes on as follows with no little skill. He turned his thoughts to Adherbal's kingdom himself daring, warlike, but he whom he was to assail quiet, unwarlike, of a gentle disposition, at the mercy of any attack, the victim rather than the cause of fear ³

8 This of the consul's generalship. For our consul had many excellent endowments of body and mind, but avarice was a clog upon them all. he was inured to toils, enterprising in character, but wary enough, no novice in war, and undaunted in the face of danger and surprises ⁴

9 Then the demoralized soldiery. The army handed over to the general, Spurius Albinus the proconsul, was without energy or warlike spirit, inured neither to danger nor toil, quicker with a word than a blow, spoiler of the allies and itself the spoil of the

¹ Sallust, Jug 7, § 4-8, § 1

² *ibid* 17 § 5

³ *ibid* 20 §§ 1 and 2.

⁴ *ibid* 28, § 5

THE CORRESPONDENCE OF

Ambr 93

praeda hostium, sine imperio | et modestia habitus. Ita imperatori nolo plus ex malis moribus sollicitudinis, quam ex copia militum auxilii aut spei bonae accedebat

10 Effeminatio:

Nam Albinus, Auli fratris exercitusque clade perculsus, postquam decreverat non egredi provincia quantum temporis aestivorum in imperio fuit, plerumque milites stativis castris habebat, nisi quom odor aut pabuli egestas locum mutare subegerat. Sed neque muniebantur castra, neque more militiae vigiliae deducebantur, uti cuique libebat, ab signis aberat. Lixae permixti militibus diu noctuque vagabantur et palantes agros vastare, villas expugnare, pecoris et mancipiorum praedas certantes agere, eaque mutare cum mercatoribus vino advecticio et aliis talibus, praeterea frumentum datum publice¹ vendere, panem in dies mercari, postremo quaecumque dici aut fingi queunt ignaviae luxuriaeque probra, ea in illo exercitu cuncta fuere et alia amplius. Sed in ea difficultate Metellum nec minus quam in rebus hostilibus magnum et sapientem virum fuisse comperior, tanta temperantia inter ambitionem saevitiamque moderatum² . . . exercitum brevi confirmavit³.

Ambr 96

11 Tum forma Marii

Per idem tempus Uticae forte C. Mario per hostias dis supplicante, magna atque mirabilia portendi harusper dixerat. proinde quae animo agitata fretus dis ageret

¹ Sallust has *publice datum*

² In the passage here omitted the Codex has *nec miles hastatus aut gregarius* where Sallust has only *no miles gregarius*

³ Of this extract rather more than one half is given.

enemy, kept in no obedience or discipline. So by their bad morale they brought their new commander more anxiety than they gave him support or confidence by their numbers.¹

10 Growth of effeminacy :

For Albinus, dismayed by the disaster to his brother Aulus and his army, resolved not to stir out of his province for such time of summer campaigning as he was in command, and kept the soldiers for the most part in a stationary camp, except when the stench or want of forage compelled a move. But the camp was not fortified, nor regular watches posted according to the rules of war, the soldier absented himself from duty as he pleased. Camp followers mingled with the soldiers and went in and out day and night, and wandered about robbing the countryside, forcing their way into the farm-houses, vying with one another in carrying off cattle and slaves, which they exchanged with the dealers for imported wine and other such like things, not content with this, they sold the state allowance of corn and bought bread for daily consumption. In a word, all the evil effects of idleness and luxury, which can be expressed or imagined, were to be met with in that army, and others besides. But in these difficult circumstances I find that Metellus proved himself a great and wise man no less than in the field, so just a mean did he keep between a pandering to popularity and undue severity . . . and in a short time he restored the discipline of the army.²

11 Then a sketch of Marius

About the same time when Marius, who chanced to be at Utica, was sacrificing to the Gods, the diviner had announced that "great and wondrous things were presaged, let him therefore rely on the Gods and carry

¹ Sallust, *Jug* 44 § 1

² *ibid.* 44, § 4 to end of 45

THE CORRESPONDENCE OF

*fortunam quam saepissime experiretur, cuncta prospere
eventura At illum iam ardua consulatus ingens cupido*

Ambr 1 page exagitat at | petere non aude¹ at ¹

12 Animo

*Simul consul quavi nullo impoꝛto omnia providere,
apud omnes adici, laudare, increpare merentia Ipse
armatus intentusque stem milites cogebat, neque secus
atque iter facere, castra munire, excubituꝛ in portas co
hortis ex legionibus, pro castris equites auxiliaꝛios mittere,
praeterea alios super valluꝛ in munimentis locare, vigiliis
ipse circumire, non dissidentia futuri, quae imperavisset,
quam uti militibus exaequatus cum imperatore labor
volentibus esset | bene atque decore*

Ambr 89

gesta ²

13 Sed forma ei imperatoris perlege et volup
taria³

*Sed in his erat Sempronia, quae multa saepe virilis
audaciae facinora commiserat Haec mulier genere atque
forma, praeterea viro liberis satis fortunata fuit, Graecis
litteris et Latinis docta, psallere saltare elegantius quam
necesse est probae, multa alia quae instrumenta luxuriae
sunt Sed ei cariora quam peteretur* ⁴

¹ About one third of this extract is given

² About two thirds of this extract are given.

³ The margin has *voluptativa*

⁴ About one half of this extract is given

through what he had in mind let him put fortune to the touch as often as he would, all would turn out well" Now, for a long time past Marius had been fired with an intense desire to be consul . . . had not ventured to sue for the consulship¹

12

At the same time the consul, as though no duty was delegated, ran to everything himself, was present everywhere, giving praise, giving blame where due. Himself armed and alert, he forced his soldiers to be so likewise, and he shewed no less caution in fortifying camps and in posting at the gates a watch from the legionaries of the cohort and in front of the camp from the auxiliary cavalry, than in making marches, he stationed others besides above the rampart in entrenchments, and went the rounds of the watch in person, not so much from any doubt that what he had ordered would be done, as that the soldiers might endure cheerfully toils which they saw shared by their leader . . . conducted with dignity and success²

13 But that is the sketch of a commander listen to some things also in a more sensuous strain

Among these was Sempronia, who had done many deeds that often shewed the daring of a man. Here was a woman sufficiently happy in her birth and her beauty, not to mention in her husband and children, she was learned in Greek and Latin literature, she could sing and dance more attractively than was required by an honest woman; and there were many other things which minister to luxury. But she valued everything more . . . than solicited by them³

¹ Sallust Jug 63 §§ 1-7.

² *ibid* 100 §§ 3-5

³ *ibid* Cat 20

THE CORRESPONDENCE OF

14. *Quibus rebus permota ciuitas atque immutata nobis facies; ex summa laetitia¹ lasciuiaque, quae diuturna quies pepererat, repente omnes tristitia inuasit, festinare, trepidare, neque loco nec homini cuiquam salis credere, neque bellum genere neque pacem habere. suo quisque metu pericula metiri. Ad hoc mulieres, quibus reipublicae magnitudine belli timor insolitus, afflic|tare sese, manus supplices ad caelum tendere, miserari paruos liberos, rogare omnia, omni rumore² parere, adripere omnia, superbia atque delicus omissis sibi patriaeque diffidere*

15 Forma, qua flagitia disciplinae plebis describuntur:

Nam semper in ciuitate, quis opes nullae sunt, bonis invident, malos extollunt, vetera odere, nova exoptant, odio suarum rerum mutari omnia student; turba atque seditionibus sine cura aluntur, quoniam egestas facile sine damno habetur³

.

Ad Amicos, i 7 (Naber, p 179)

[FRONTO Aufidio Victorino salutem.

Antoninus Aquila vir doctus est et facundus
Quod tu dicas, *Audistine eum declamantem?* Non

¹ m¹ *luxuria*.

² *Omni rumore* and *adripere omnia* are not found in our Sallust.

³ This letter, says Hauler (*Rhein Mus* 54, Pt 2, p 161), is followed by an undeciphered letter of thanks from Marcus To this apparently belong the fragments given by Naber (p. 111; Ambr. 89, col. 2): *misisti . . . nonus . . . sed quem*

14. *By these events the state was stirred to its depths, and the face of the city transformed for us: from the height of luxury and licentiousness, the outcome of a long-standing peace, all were suddenly seized with gloom; there was hurry, there was confusion, and no place, no person, was quite trusted; they were not at war, they were not enjoying peace; each man made his own alarm the measure of his danger. Moreover the women, unused to the fear of war, by reason of the greatness of the state, worried themselves, raised suppliant hands to heaven, bemoaned their little children, questioned everything, quaked at every rumour, snatched at every bit of news, and forgetting their pride and their pleasures, were despondent for themselves and their country*¹

15 Sketch of the insubordination of the people and their excesses:

*For in a state those who have no wealth of their own invariably envy the better classes, glorify the bad, hate what is old, hanker after change; from discontent with their own condition, they are eager for a revolution, disorder and public discord provide them with subsistence without any effort of their own, since poverty is easily maintained without loss*²

.

² 164 A.D.

FRONTO to Aufidius Victorinus, greeting

Antoninus Aquila³ is a learned man and an eloquent. But should you say, *Have you heard him*

¹ Sallust, *Cat.* 31, §§ 1-3

² *ibid.* 37, § 3.

³ An eminent rhetorician of Galatia; see Philost. *Vit. Soph.* ii, under Chrestus.

THE CORRESPONDENCE OF

mediusfidius ipse audiui, sed credidi affirmantibus id doctissimis et honestissimis et mihi crissimis viris, quos et iudicare recte posse et ex animi sententia testimonium perhibere certe scio

Velim, Domine, ut adiuves eum quo facilius in civitate aliqua istius provinciae publice instituendis adulescentibus adsciscatur Impense istud a te peto fautum¹ enim Aquilae volo honoris eorum causa, qui pro eo studiose laborant, nec ita ei studerent profecto, nisi dignum tanto studio arbitrarentur, nec nisi facundiam eius magno opere probarent, tibi eum commendari tanto opere postularent, quom te gravissimum et prudentissimum iudicem cum aliarum rerum tum vel praecipue eloquentiae sciant Ego vero etiam nomini² hominis faveo, ut sit *ῥητόρων ἀριστος*, quoniam quidem Aquila appellatur.

Ad Amicos 1 12 (Naber, p 181)

<ΓΡΟΝΤΟ> Ausidio Victorino genero <salutem>

Litteris quis, domine,³ . . . <dei, si licet>⁴ | meremur, et mihi filium et tibi uxorem, ut recte

¹ Heinlorf for Cod *factum*

² Heindorf for Cod *nomine*, which, however, the margin of Cod supports having the note *faveo illa re*

³ These words are from the Index (Cod Ambr 337, Naber, p. 172)

⁴ Two pages are missing from the Codex between the last legible word of *Ad Amicos*, 1 11 (*aliter*) and *meremur* here

M. CORNELIUS FRONTO

declaim? no, of a truth, I myself have not, but I take it in trust on the assurance of the most learned and honourable men and very dear friends of mine, who I am perfectly certain are both able to judge correctly, and bear witness to what they really think.

I would wish you, honoured son,¹ to use your influence to get him an appointment as public instructor of youth in some state within your province.² I ask this earnestly of you, for I would have favour shewn to Aquila for their sake who interest themselves so diligently in his behalf, and they would surely not so interest themselves for him, did they not think him worthy of such great interest; nor unless they greatly approved of his eloquence, would they make such a point of his being recommended to you, knowing you to be a most serious and competent judge as well of other things as especially of eloquence. I however have faith in the man's very name, shewing him to be the prince of orators, since indeed he is called Aquila.

? 164 A.D.

FRONTO to Aufidius Victorinus his son-in-law, greeting.

The letter, honoured son, which The Gods, if we deserve it, will deal kindly with my

¹ This conventional use of *Domine* (*ep Domine frater*, p. 244, and even, if the MS is correct, *domine magister*, *Ad An'* ii 1), is ridiculed in an epigram of the *Anthologia Palatina*, x 44.

² Victorinus, the son in law of Fronto, was appointed legatus of Germany about 162.

THE CORRESPONDENCE OF

proveniat, favebunt et familiam nostram liberis ac nepotibus augebunt et eos, qui ex te geniti sunt eruntque, tui similes praestabunt. Cum isto quidem sive Victorino nostro sive Frontone cotidianae mihi lites et iurgia intercedunt. Quom tu nullam umquam mercedem ullius rei agenda dicendaeve a quoquam postularis, Fronto iste nullum verbum prius neque frequentius congarrir quam hoc *DA*: ego contra quod possum, aut chartulas ei aut tabellas porrigo, quarum rerum petito rem eum esse cupio. Nonnulla tamen et aviti ingenii signa ostendit. Uvarum avidissimus est; primum denique hunc cibum degluttivit, nec cessavit per totos paene dies aut lingua lambere uvam aut labris saviari ac gingivis lacessere ac ludificari. Avicularum etiam cupidissimus est; pullis gallinarum columbarum passerum oblectatur, quo studio me a prima infantia devinctum fuisse saepe audi vi ex eis qui mihi educatores¹ aut magistri fuerunt. Senex autem quanto perdicum studio² tenear, nemo est qui me leviter noverit quin sciat. Nullum est enim factum meum dictumve quod clam ceteris esse velim; quin cuius rei mihimet ipse conscius sim, ceteros quoque omnes iuxta mecum scire velim³

¹ For *Conductores* ² *cp.* l. p. 239.

³ Apparently very little is lost.

¹ The same person, viz. Gratia, who was possibly with c¹ 11. The son here mentioned must be the consul of 199 A.D., who set up an inscription to his son of the same

M CORNELIUS FRONTO

daughter and your wife,¹ that all may go well, and will bless our household with children and grand children, and will see to it that those, who have been and shall yet be born of you, shall be like you. Daily tiffs indeed and disagreements I have with our little Victorinus or our little Fronto. While you never ask any reward² of any one for act or speech, your little Fronto prattles no word more readily or more constantly than this *Da (Gue)*. I on my part do my best to supply him with scraps of paper and little tablets, things which I wish him to win. Some signs, however, even of his grandfather's characteristics he does shew. He is very fond of grapes: it was the very first food he sucked down, and for whole days almost he did not cease licking a grape with his tongue or kissing it with his lips and mumbuling it with his gums and amusing himself with it. He is also devoted to little birds, he delights in chickens, young pigeons, and sparrows. I have often heard from those who were my tutors and masters that I had from my earliest infancy a passion for such things. As for my penchant however, for partridges in my old age, there is no one who knows me ever so slightly but is aware of that. For there is no deed or word of mine that I would wish to keep secret from others. Nay, whatever there be in my heart of hearts I would wish all others to know as well as myself.

NAME M AUFIDIO FRONTO NI PRONEPOTI M CORNELII
FRONTONIS ORATORIS CONSULIS MAGISTRI IMPERATORUM
LUCI ET ANTONINI NEPOTI AUFIDI VICTORINI PRAE
PECTI VRBI BIS CONSULIS FRONTO CONSUL FILIO
DULCISIMO (*Corp Inscr Lat.* XL 6334).

¹ See Dio lxxii 11

THE CORRESPONDENCE OF

Ad Amicos, i 13 (Naber, p 182)

Ambr 323

| <Γρόντο> Ausidio Victorino genero <salutem>

Graviter oculos dolui¹ Nullus dolor au
<cruciatu>² lateris aut internitū oriebantur
Internitium³ Graeci ἱερὸν ὀστοῦν, Suetonius Tran
quillus *spinam sacram* appellat Ego me nequ
Graecum neque Latinum vocabulum ullius membr
nosse mallet, dum istius doloris expers vitan
degerem

Ad Amicos, ii 6 (Naber, p 191)

ARRIO ANTONINO <Fronto salutem>.

Ambr 200
col 1 line 6
(Brakman),
Naber says
287 f llo v
ing 285

Multum amicorum⁴ | eram Demon
stratus est mihi a doctis et multum mihi familiaribus
viris, quorum apud me voluntas ipsorum merito valet
plurimum Igitur, si me amas, tantum Voluminio
tribue honoris facultatisque amicitiae tuae amplex
tendae, οἱ γὰρ φιλτατοὶ ἄνδρες conciliaverunt eum
mihi Igitur tam comi amicitia accipias velim quam
ille volebat, Menoetiadi ζωροτερον δὲ κέραιρε quom
imperabat

¹ From the Index (Naber, p 172, Ambr 338) Several lines are lost

² Brakman reads this word on the margin of the Codex

³ 1 23) for M's *inter*
west vertebra of the
spine In *Anthol Pal* xi 38 it means 'skull'

⁴ From the Index (Naber p 189, Cod Ambr 277) The first part of the letter is lost in the gap that follows *Ad Amicos*, ii. 4 This gap contained pp 339 and 338

FRONTO to Aufidius Victorinus his son in law, greeting¹

I have had severe pain in the eyes No pain or lumbago in the side or back came on. The Greeks call the back-bone *ισπὸν ὀστέον* (the sacred bone). Suetonius Tranquillus calls it the *sacred spine*. For my part I would gladly not know the Greek or Latin name of a single member, if I could only live without pain in it.

FRONTO to Arrius Antoninus,² greeting

. He has been brought to my notice by learned men and close friends of my own, whose personal wishes rightly have the greatest weight with me. Therefore, if you love me, accord to Volumnius so much respect and opportunity of gaining your friendship, for very dear friends have enlisted my sympathy for him. Therefore I would ask you to welcome him with such kindly friendship as the great Achilles wished to shew, when he bid the son of Menoetius *mix the wine stronger*³

¹ Publ. Consentius in his *Ars Grammatica* p. 2031. 16 (Putsch), quotes from Fronto *et si de res rae Altheiae Doro-cottum* (Rheims) words which were probably contained in a letter to Victorinus in his province.

² An interesting personality and a relative probably of Pius. We have his *curia honorum* in an inscription set up by the municipality of Concordia (*Corp. Inscr. Lat.* v. 1574). There is an inscription also set up to him at Ciria (see De-sau, 1119). Tertullian (*de Spect.* 5) gives us an interesting anecdote of him in connection with a persecution of Christians in Asia Minor, 164-5.

³ Hom. *Il.* ix. 203. The son of Menoetius was Patroclus. Iliad (viii. v. 4) discusses the carrying of these words. See also Athen. x. 6. The usual texts of Homer read *κραν*

THE CORRESPONDENCE OF

Ad Ambr. II 7 (Naber, p. 192).

ANNIO ANTONINO <Fronto salutem>.

1. Hæc mi, domine fili carissime. Sicut eos qui dicta factaque tua <in> administranda provinciæ maximis laudibus ferunt, lætus ac libens audio, ita si quis quid remurmurat aut deprecatur, multo scrupulosius ausculto, et quo quicque modo gesseris aut iudicaveris requiro, ut qui existimationi tue famaeque iuxta quam mere consultum cupiam

2 Volumnius Serenus Concordiensis, si nihil in eis, quæ commemorat, aut¹ veræ rei demisit aut addidit, iure meritoque utetur me apud te vel patrono vel precatore Quodsi ultra epistolæ modum videbor progressus, eo eveniet | quod ea res postulat ut cum epistula coniuncta sit quaedam causidicatio

3 Rem omnem ita, ut mihi Volumnius exposuit, proponam simul et unumquidque verumne sit rogabo

Estne lege coloniae Concordiensium cautum, ne quis scribam faxit nisi eum quem decurionem quoque recte facere possit? Fueruntne omnes et

¹ Klussmann for Cod *commemorant*

¹ This letter is inserted at f. 100 v. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

temporarily exiled for an offence not involving *infamia* might on his return take up his old position, but, if not a

? 164 A.D.

FRONTO to Arrius Antoninus, greeting¹

1. Health to my honoured and most dear son¹ just as I listen with willing and welcoming ears to those who are loudest in praise of your words and deeds in the administration of your province, so, if anyone grumbles at all or carps at it, I give him a much more critical hearing and require every detail of your acts and decisions, as one who would safeguard your reputation and good name equally with my own

2 Volumnius Serenus of Concordia,² if in what he tells me he has subtracted nothing from the truth, nor added anything to it, has every right and claim to my services as his advocate and intercessor before you. But if I seem to overstep the limits of a letter, the reason will be, that the facts of the case require some legal advocacy to be mixed up with the letter

3 I will set forth the whole matter as Volumnius has stated it to me, and ask you at the same time as to each point, whether it is true

Is it provided by the charter of the Colony of Concordia,² that no one be made a notary except he be eligible also for the office of municipal senator?

senator previously, he could only become one with the emperor's express permission. By excluding Volumnius even for a time from the senate, Antoninus might seem to affix upon him the stigma of infamy. Fronto argues that there can be no doubt he was a senator before his exile. We learn from this letter also that the decurions had to pay for their privileges. The case came under the cognizance of Antoninus as *jurisconsultus per Italiam et per nos Transpadanæ* (see inscription quoted under the previous letter)

¹ In Venetia

sunt ad hoc locorum, quibus umquam scriptus publicus Concordiae <de>latus¹ est, decuriones?

Factusne est Volumnius decreto ordinis scriba et decurio? Pensiones plurimis ad quartam usque ob decurionatum dependitne?

Ususne est per quinque et quadraginta annos omnibus decurionum praeiis commodisque, cenis <in> publicis, in curia, in spectaculis? Cenavitne seditne ut decurio, censuitne?

Si quo usus fuit publice legando, legatusne est Volumnius saepenumero? Estne Volumnio legato semper² viaticum publicum decretum

Item legationis de re frumentaria gravis a Volumnio susceptae estne in commentariis publicis descripta commemoratio?

4 Si omnia ista, quae supia dixi, ita decreta, ita depensa, ita gesta sunt, quid³ est cur dubites post quinque et | quadraginta annos sitne decurio, qui scriba fuerit, pecuniam ob decurionatum intulerit, comoda decurionatus usurpaverit, munia functus <fuerit>⁴? Et quid est, mi fili, quid est quod ista probari tibi planius⁵ velis? Quoniam quae . . . ⁶ | <commo>|dis, p ecuniam intulerit, munia fecerit

5 Post ista ultro citroque a me rogata atque responsa, nonne etiam praeiudicium⁷ delatus est Volumnius quasi in curiam inrumperet, quom ei ius⁸ introeundae curiae non esset ut relegato, quod

¹ Klussmann

² Heindorf for Cod *per*

³ Cod *id*

⁴ Or query *fecit* for *functus*

⁵ For Cod *plenius*, a form which fronto repudiates (p. 183)

Have they all been and are they all senators, who up till now have ever been given the post of notary public at Concordia?

Was Volumnius elected notary and senator by a resolution of the local senate? and has he made as many as four payments in respect of his senatorship?

Has he enjoyed for five and forty years all the rewards and privileges attaching to senators, at public banquets, in the senate house, at shows? Has he dined, has he sat, has he voted as a senator?

In the case of public deputations has Volumnius been often chosen to be a deputy? Have his expenses as deputy always been voted to Volumnius from the public chest?

Again is there in the municipal registers record of a deputation on the corn supply undertaken by Volumnius at his own charges?

4 If all this that I have mentioned above has been so decreed, so paid, so done, how can you be in doubt after five and forty years whether he is a senator, who has been a notary, has paid in money in respect of his being senator has enjoyed the privileges of being senator, has discharged its duties? And what is there, my son, what is there that you would wish more plainly proved? Since (has enjoyed) the privileges, paid in moneys, discharged duties

5 After these questions and answers of mine backwards and forwards, is it not also a begging of the question Volumnius has been accused of forcing his way into the senate illegally, since as a man temporarily banished he had no right to enter

⁶ Thirty seven and a half lines are lost.

⁷ Five lines lost

⁸ Niebuhr for *Cod. eius*

THE CORRESPONDENCE OF

neque ante exillum pro decurionatu omnem pecuniam
neque ullam posterius intulisset. Quae cum longis-
simis temporibus forent perorata, Lollius Urbicus
causa inspecta nihil adversus Voluinnium statuit;
sed loco | sed pro istum
An br 296
(Naber 295) num debet defenderit
pro honore ratis, non video qui possit asse . . non
insitus †

Quid, quod imperatores nostri in Isidori Lysiae
causa ita constituerunt¹ aut an
legatio | tus simul per . . .
Ambros 304 ignominia inuritur sempiterna²

Non idem dedecus est homini solitario ignominia
ferri, quantum dedecus est plena liberis ac nepoti-
bus domo infamia notari, cuius infamiae aspergo
inquinat simul multos et dedecorat. Sicut non
eadem clades est in proelio unum equitem obtrun-
can et triremem frangi. Tur . . .³ armato
et remis vero perierit⁴

6 Leges pleraeque poenam sanciverunt, ne quis
arborem felicem succidisset. <Haec> quatenus est
arboris felicitas? Rami scilicet⁵ fecundi et frugi-
feri, bacis pomisque onusti. Nemo cannam quamvis
proceram, nemo harundinem dixerit felicem. Ae-
quiusne est arboribus honori atque tutelae poma et
bacas esse quam hominibus liberos nepotesque?

¹ Eighteen lines are illegible here.

² From the margin of Cod

³ Seven lines are lost. ⁴ Eight lines lost

⁵ Eckstein for unintelligible letters in Cod

¹ He was *praef urb* in 152 and following years, when this case would have come before him. We know that he condemned certain Christians, named Ptolemaeus and Lucius to death (Justin, *Apol.* ii §§ 1 and 2). He was also governor

it, in that neither before his exile had he paid in all the money for his senatorship nor any since. When all this had been argued out in the lengthiest of proceedings, Lollius Urbicus,¹ after examining the case, made no decree against Volumnius, but in place of reckoned in proportion to the honour, I do not see

.
What again of the similar decision of our Emperors² in the case of Isidorus Lysius? is branded with indelible infamy

The disgrace is not the same for a single man to receive the stigma of ignominy, as is the disgrace for a house full of children and grandchildren to be stained with infamy, for this bespattering with infamy defiles and disgraces many at once. Just as the loss is not the same in wars if a single horseman be cut down or a trireme be rammed

.
6 Many laws³ have fixed a penalty for cutting down "happy trees"⁴. What is this happiness of a tree? Is it not flourishing and fruit bearing branches laden with berries and fruit? No one ever called a reed, however tall, no one ever called a bamboo happy. Is it more right that fruits and berries should count as an honour and safeguard for trees than children and grandchildren for men?

of Britain, defeated the Brigantes, a Yorkshire tribe and completed the Wall of Antoninus between the North and the Clyde. See *Corp. Inscr. Lat.* x. 419 (424).

² Marcus and Verus. Nothing further is known of the case of Lysias. ³ *De leg.* xlviii 7, 2, *Quint.* iv 2 etc.

⁴ *De arboribus Cato dixit quæ fructum ferunt, Iul. ex Fest.* p. 92.

ibr 803 | globus equitum Romanorum, pars curiae in uno homine dehonestatur Raro unquam tot simul capita de caelo tacta sunt, quot tu condemnasti

7 Ille qui esse quam videri bonus maluit, fortunis parum prosperis usus est Verum est eum, qui opinionem virtutis neglegat, ipsam quoque neglegere virtutem Nec quisquam bonis artes magno opere studet adipisci, quas adeptus necne sit non studet scire¹ donecum de sententia cumulare verbum quod in sententia curia cur miror principio sin repudium dare et Gneus² orbam possit, id dubito Namque id quod longum sit posse interdum fieri longius, altum altius, numerosum numerosius Haec et eiusmodi verba video admittere aliquod augendi laxamentum, pleno autem plenius nihil fieri posse Nam poculum profecto si plenum sit, | magis compleri frustra postules, nisi effuderis Enimvero quom omnibus negotiis artata sint tempora <et huic quidem> tempus alterum, <illi>³ coniunctum alterum, reputes cum animo tuo an ista causa tempus argumenti probandi careat Antequam decurio per <curiam> creari debuit. creatus est, ubi creatus est, usurpare honorem debuit multifariam usurpavit, postquam usurpavit, pensionibus inferre pecuniam debuit quater intulit, munia decurionatus <facere debuit fecit>, et esset quidem labrum sum et tanto redemptas⁴ parum valent, quidquid huc additum fuerit, frustra abunda-

¹ These five sentences are from the margin of the Codex.

² Bittm would read *gnatus*

³ Hündorf would read *an in ista causa careas*.

⁴ Klussmann for Cod *tanta re tentas*.

M. CORNELIUS FRONTO

. . . a troop of Roman cavalry, a part of the senate is dishonoured in the person of one man scarcely ever have so many men lost their lives physically by lightning as will lose theirs civilly by your decision

7 He, who has preferred being to seeming good, has enjoyed far from prosperous fortune Certain it is that he who cares not to be thought virtuous does not care to be virtuous either Nor is there anyone who is greatly interested in acquiring the noble arts that is not interested to know whether he has acquired them

. but if he can grant a divorce and Gnaeus can be bereaved—that is what I doubt For what is long can on occasion become longer, what is deep, deeper, what is numerous, more numerous These and similar words I see admit of some latitude of increase, but nothing can become fuller than full For surely if a cup be full, it would be useless to ask for it to be filled still more, unless you emptied some of it For indeed, since in all business time is limited, and one time is closely associated with this business and another with that, consider in your own mind whether this case lacks the time for proving the point urged Before that he ought to have been elected senator by the senate he was elected, when elected he ought to have exercised his rights he did exercise them in many ways, after exercising them he ought to have paid in money by fixed instalments he did pay this in four times, he ought to have discharged the duties of senatorship he did discharge them, whatever is added to this will be a superfluity.

esse longis: senectus crepusculum est, quod longum esse non potest meliendi sunt debet

9. Proculus biennium illud est homini seni quidquid interim sit iuxta interim sit poenam interrogatam praevertit, et quinquennium in triennium artavit. Namque meum late tum omnium facit Clementer | . . .² Proculus homo ingenio ad cetera remisso et delicato sed in sententis dicendis ad puniendum puillo ut <opinor pro>³rior et infestior Plerique ad cetera visi minime seri, in iudicando tamen asperi fuere, scilicet ut pro severitate, qua carerint, obtentui saevitiam subornarent,

10 Biennium tunc de demum Voluminio pro nunc biennium vita agi te <ex sent>entia tua res detrahi ignominiam <libe>ris nepotibus genero⁴ adfinibus, quibus domi patrem fratresque reliqueris Subleva misericordia aetatem familiarem tibi et patritam et rescindas | interim vel tutus eum si vita vel dolor decurio pec<uni> te meum in te qui omnem pro decurionatu pecuniam dependisset Sibi num, fili, ni quae quidem interdum facias <velim>

¹ Ehrentthal would read *interitum*, but the word is repeated in the margin

² Nine lines lost at the beginning of the page.

³ Schwierczina is responsible for *opinor* and Alan for *pro* or

⁴ Klussmann for Cod. *genere*

be long. Old age is a twilight that cannot last
 must be measured

9. Proculus¹ that two years period
 for an old man whatever is mean-
 while means but a mean while quashed the
 penalty and shortened the five years to three
 For

. . . . Proculus, a man of a disposition in all other
 respects easy-going and pleasure-loving, yet in passing
 sentence was, I think, a little too ready to punish,
 and too severe Many who have seemed in
 other matters far from taking things seriously, yet
 have been harsh on the bench, wishing no doubt to
 hide their real lack of severity under a cloak of
 ruthlessness put on for the purpose

10 The two years then at last for Volum-
 nus
 his children, grand children, son in-
 law, and relations to be freed from infamy, for whom
 you will leave father and brothers at home
 Relieve by your compassion an age which you know
 so well in your home and in your father and
 cancel that *meanwhile*

.

 had paid all the money for his senatorship

¹ There was a notable jurist named Proculus quoted in the *Digest*. A Cornelius Proculus is also mentioned in the *Digest* as the recipient of a rescript from Marcus and Verus.

THE CORRESPONDENCE OF

Ad Aristeas, II 8 (Naber, p. 109).

<PROXTO> Arrio Antonino <salutem>

Gratulor mihi plerisque hominibus¹ esse
² esse me a te non secus quam parentem
 observari. Eo sit ut ad me decurrant plurimi, qui
 tuam gratiam cupiunt. Quos ego non temere nec
 sine dilectu audio sed probe petentibus suffragium
 meum impertio. Iis vero qui parum probe quid a te
 impetratum velint, <pos>se³ denego. Ut a me
 potius ill<um> te repulsi⁴ Baburiana
 nos sua sita caros mihi viros
 et magno opere iis obsequi cupiam, ita tamen ut
 <sum>ma⁵ | mihi ac potissima sit iustitiae tuae
 ratio⁶ tute humanitati congruens videbatur,
 desiderium Baburiana⁷ commendandum tibi recepi,
 et quam possum studiosissime commendo ego
 per de opere extruendo extractum
 Videbatur defendi pronuntiaſti quid
 ad quo agas quod fuit tradendum,
 superest quod a te in pauca conferam.

Sententiae tuae Baburiana non aequo animo sed
 prompto etiam et paene <libente animo obtemper
 avit>⁸ Quid igitur postulat, quod non im
 bitiosum concessu, Baburinae vero <migno opere>⁹
 iucundum impetratu fuerit <di>cunt ⁊
 quae de sententia tua usurarum penditur

¹ Six letters are missing. The preceding words are partly
 from the Index (Ambr 277, Naber p. 181).

² Three lines are lost. ³ Naber *esse*. Klussmann *ipse*.

⁴ So Niebuhr, but Naber prints *erctul* . . .

⁵ Schwierczina prefers *prima*.

⁶ Two lines lost. ⁷ Cod. *Baburiani*.

⁸ The gap is of about thirty letters. Possibly *modo* has
 fallen out or should replace *animo*. ⁹ Naber.

? 164 A.D.

FRONTO to Arrius Antoninus, greeting.¹

I congratulate myself that for most men it is that I am looked up to by you quite as a parent. Consequently very many who desire your favour have recourse to me. I do not give them a hearing at haphazard and without circumspection, but I lend my support to those whose petition is honest. To those, however, who wish to obtain some dishonest advantage from you, I say *Impossible*. That Baburiana should rather from me men dear to me and I would most gladly oblige them, only so far however as is compatible above and before all with a regard for your justice It seemed in keeping with your humane disposition²; I took upon myself to commend Baburiana's wish to you, and I do commend it most heartily with regard to constructing the work

Baburiana bowed to your decision not resignedly only but even promptly and almost willingly What then does she ask which would not be worth your while to grant, and at the same time very much to Baburiana's interest to obtain payment of interest in accordance with your decision

¹ This letter seems to refer to a contract for a public building, for part of which Baburiana was responsible. Arrius had found some fault with this, or had fined B for the work not being finished in time.

² *Humanitas* was beginning about this time to get the meaning *humanity*. See Aul. Gell. xiii. 16; *Digest*, xlv. 37, etc.

THE CORRESPONDENCE OF

Ad Ariste, II. 8 (Naber, p. 199).

<PROPTO> Arrio Antonino <salutem>.

Gratulor tibi plerisque hominibus¹ esse
² esse me a te non sciens quam parentem
 observari. Eo sit ut ad me decurrant plurimi, qui
 tuam gratiam cupiunt. Quos ego non timere nec
 sine dilectu audio sed probe petentibus suffragium
 meum impertio. His vero qui parum probe quid a te
 impetratum velint, <pos>se³ denego. Ut a me
 potius ill<um> te repulsun⁴ Baburina
 nos sua sita caros mihi viros
 et magno opere vis obsequi cupiam, ita tamen ut
 <sum>ma⁵ | mihi ac potissima sit iustitiae tuae
 ratio⁶ tuae humanitati congruens videbatur;
 desiderium Baburinae⁷ commendandum tibi recepi,
 et quam possum studiosissime commendo ego
 per de opere extruendo extructum
 Videbatur defendi pronuntiasti quid
 ad quo agis quod fuit tradendum,
 superest quod a te in pauca conferam.

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 prompto etiam et paene <libente animo obtemper
 avit>⁸ Quid igitur postulat, quod non am-
 bitiosum concessu, Baburinae vero <migno opere>⁹
 iucundum impetratu fuerit <di>cunt a . . .
 quae de sententia tua usuiarum penditur

¹ Six letters are missing. The preceding words are partly from the Index (Ambr 277, Naber, p. 18.)

² Three lines are lost. ³ Naber *esse* Klussmann *ipse*

⁴ So Niebuhr, but Naber prints *erctul* . . .

⁵ Schwierczina prefers *prima*

⁶ Two lines lost. ⁷ Cod. *Baburiani*

⁸ The gap is of about thirty letters. Possibly *modo* has fallen out or should replace *animo*. ⁹ Naber

? 164 A.D.

FRONTO to Arrius Antoninus, greeting.¹

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² *Humanitas* was beginning about this time to get the meaning *humanity*. See Aul. Gell. xii. 16; *Idest*, xlv. 37. etc.

THE CORRESPONDENCE OF

. . . . extruendo adiungatur¹ quondam
petita Contulisse infamia multata videtur
Id populo quoque²

Ad Amicos, I 8 (Naber, p 179)

FRONTO PASSIENO Rufo salutem.

Ambr 320,
following
321

Aemilius Pius cum studio[rum] elegantia tum
morum eximia probitate mihi carus est Commendo
eum tibi, frater Nec ignoro nullum adhuc inter
nos mutuo scriptitantium³ usum fuisse, quamquam
ego te optimum virum bonarumque artium secta-
torem communium amicorum fama cognossem, et tu
fortasse aliquid de me secundi rumoris acceperis
Sed nullum pulchrius amicitiae copulandae <tem-
pus>⁴ reperire potui quam adolescentis optimi conciliandi tibi occasionem Ama eum, oro te Cum
ipsius causa hoc peto, tum mea quoque Nam me
etiam magis amabis si cum Pio familiaris egeris
Novit enim Pius nostra omnia et in primis quam
cupidissimus sim amicitiarum cum eiusmodi viris,
qualis tu es, copulandarum

Ad Amicos, I. 6 (Naber, p 178)

| FRONTO AVIDIO CASSIO salutem.

Ambr 222,
col. 1 ad fin.

Iunius Maximus tribunus, qui laureatas adtulit
litteras, non publico tantum munere strenue, sed

¹ Seven or eight lines are lost

² Two pages are lost before the next letter (*III viris et
Derivatis*, Ambr 306

³ Heindorf for Cod *scriptitant. m*

⁴ Mai

⁵ There was another letter to Arrius in the Codex, but we
have only its title in the Index (Naber, p 189; Ambr 277
or 292) and the first two words, *Valerianus Clitanius*

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. . . . attached to the construction of the work

¹

FRONTO to Pissienus Rufus,² greeting. ? 164 A D

Aemilius Pius³ is endeared to me both by the refinement of his tastes and the absolute integrity of his character. I commend him to you, my brother. I am not unaware that hitherto we have not been on the terms of correspondents, though I have known of you through common friends as an excellent man and a lover of the noble arts, and you perhaps have heard me well spoken of. Yet I could find no fairer prospect of establishing a close friendship with you than the occasion of recommending to your favour an excellent young man. Love him, I beseech you. I ask this for his sake, but also for my own. For you will love me too the more, the more intimate with Pius you become. Pius knows all my heart, and how very much I desire to enter into close friendship with such men as yourself.

FRONTO to Avidius Cassius,⁴ greeting. 165 A D

Junius Maximus the tribune, who brought the laurelled⁵ letter, not only discharged his public

² Possibly consul in 149, and if so, proconsul about 164
 separated the two offices

 war. He afterwards
 after a six months
 dream of empire was assassinated.

⁵ In token of victory on the successful termination of the Parthian war. So in the Peninsular war our coaches ran down through the country decked with laurel when a victory had been won.

THE CORRESPONDENCE OF

privato erga te officio amice functus est; ita de laboribus et consiliis tuis et industria et vigilantia praedicator ubique frequentissimus extitit. Ad me quidem minus valentem quem in suburbanam villam venisset, numquam cessavit in vespertinum usque fabulas neectere itinerum tuorum et disciplinae ad primum morum institutae ac retentae; tum in agmine ducendo et manu conserenda strenuissimi vigoris tui et consultissimae opportunitatis; prorsus ut nullus miles Plautinus de suis quam hic de tuis virtutibus gloriose praedicaret nisi quod Plautus de suo milite cum lepore, hic de te cum amore et cum summa fide |. Dignus est quem diligas et suffragis tuis ornes Tunc propriae gloriae addideris, quantum dignitati praedicatoris tu adstruxeris

Ambr 221

Ad Amicos, i 10 (Naber, p 186)

Ambr 279
eol 1

| <FRONTO> Fulviano <salutem>

Ego integer epistularum¹ Munus hoc ab ineunte aetate infrequens habui et paene neglectum, nec quisquam est hominum, nisi me fallo, qui rarius quam ego scripserit ad amicos aut rescripserit, nec quisquam de² <quo minus> quam <de me> noscitur | den³ . . . ultro citroque tibi <facul>tas est . . . te . . . tamen . . .

Ambr 282

¹ From the Index (Naber p 172, Cod Ambr 337) See Hauler (*Ueber die* 33, Pt I, p 175) I follow Brakman in placing here the following sentence, which Naber gives to *Ad Amicos*, i 18

mission with despatch, but also his private duty towards you with friendship, so unflinchingly did he appear everywhere as the eulogist of your labours and measures and industry and vigilance. Indeed, when he came to me in my villa near the city, when I was far from well, he never ceased till nightfall telling tale after tale of your expeditions and of the discipline which you had restored and maintained up to the ancient standard, then of your unremitting vigour on the march and unerring instinct for the right moment for battle. In very truth no soldier of Plautus¹ so vaingloriously eulogized his own merits as he did yours, only that Plautus in the case of his soldier spoke with pleasantry, while of you Maximus spoke with affection and the utmost loyalty. He deserves your love, and to profit by your patronage. Whatever you do to enhance the honour of your eulogist will redound to your own glory.

165 A D

FRONTO to Fulvianus greeting

In the matter of letters when I was vigorous From my earliest days I have paid but fitful attention to this duty and almost neglected it, and if I mistake not, there is no man who has written to his friends or answered their letters less often than myself, nor anyone

. You have an opportunity of (sending)

¹ The *Miles Gloriosus*.

² To the end of the page 22 lines are lost.

³ Query <reclutatio>.

THE CORRESPONDENCE OF

Ambr 31
 ami is et comitibus hic potui
 quod non post quae
 neque duco, neque unquam querar. Quid igitur?
 Nonne illud quoque evenire solet, ut is, qui diu
 amiserit quempiam, subito vel levitate morum
 vel copia novorum amicorum desinat amare? Scis
 saepe numero hoc satis multis usu venisse, sed non
 nostrae mensurae hominibus hoc
 alias amicis¹ diligentiae² nos
 trae mediocritatis retinet.

Ad Verum Imp. ii 3 (Naber, p. 171).

<MAGISTRO MEO>³

Ambr 4th,
 following
 471

. . . . | illi suis litteris subdiderunt. Ea vero
 quae post meam profectionem gesta sunt ex litteris
 a<d> me scriptis a negotio cuique praepositis duce-
 bus cognosces. Earum exemplaria Sallustius noster,
 nunc Fulvianus, dabit. Ego vero, ut et consiliorum
 meorum rationes commemorare possis, meis quoque
 litteras, quibus quidquid gerendum esset demon-
 stratur, mittam tibi. Quodsi picturis quoque quis-
 dam desideraveris, poteris a Fulviano accipere.
 Et quidem quo magis te quasi in rem praesentem
 inducerem, mandavi Cassio Avidio Martioque Vero
 commentarios quosdam mihi ficerent, quos tibi mit-
 tam, et quibus⁴ mores hominum et sensum⁵
 eorum cognosces. Quodsi me quoque voles aliquem
 commentarium facere, designa mihi qualem velis.

¹ In these lacunae five lines are included. ² One word.

³ Niebuhr annexes this letter to *Ad Verum*, ii 10, which seems very unlikely. Mai suggests that it may be part of *Ad Verum* ii. 2, which is impossible from the contents of it.

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backwards and forwards to friends and companions
 nor do I think so, nor shall I ever complain
 What then? Is not this often the case that one, who has long loved another, suddenly, whether from fickleness of character or by reason of the quantity of his new friends, gives up loving? You know that this has constantly occurred to quite a number of people, but not to persons of our type

LUCIUS VERUS TO FRONTO

165 A D

To my master, greeting

. . . . they subjoined to their letters What was done, however, after I had set out you can learn from the despatches sent me by the commanders entrusted with each business Our friend Sallustius, now called Fulvianus, will provide you with copies of them But that you may be able also to give the reasons for my measures, I will send you my own letters as well, in which all that had to be done is clearly set forth But if you want some sort of pictures besides, you can get them from Fulvianus And to bring you into closer touch with the reality, I have directed Avidius Cassius and Martius Verus to draw up some memoranda for me, which I will send you, and you will be quite able from them to gauge the character of the men and their capacity, but if you wish me also to draw up a memorandum, instruct me as to the form of it

⁴ Naber <tu>

⁵ so Cod anticipated by Heindorf.

THE CORRESPONDENCE OF

faciam, et ut iubes faciam Quidvis enim subire paratus sum, dum a te res nostrae illustrentur Plane non contempseris et orationes ad senatum et adlocutiones nostras ad exercitum Mittam tibi et sermones meos cum barbaris habitos Multum haec tibi conferent

Ambr 435 Unam rem volo non quidem demonstrare discipulus magistro, | sed existimandum dare Circa causas et initia belli diu commoraberis, et etiam ea quae nobis absentibus male gesta sunt Tarde ad nostra venies Porro necessarium puto, quanto ante meum adventum superiores Parthi fuerint, dilucere, ut quantum nos egerimus appareat An igitur debers, quomodo πεντηκονταετιας Οουκνιδιδης explicuit, illa omnia corripere, an vero paulo altius¹ dicere, nec tamen ita ut mox nostra dispendere, ipse dispicies

In summa meae res gestae tantae sunt, quantae sunt scilicet, quouquoimodi² sunt tantae autem videbuntur, quantis tu eis videri voles

(Naber, p 202 *ad init Principia Historiae*)

<DOMINO meo Antonino Augusto >

Ambr 26, 10 lower h, 204 and 63 | des adessee dies . in elogis te
nunc legis quod . . . magni . . .³ et

¹ Heinlof *lati* is

² A locative use | as genitive of quality

³ There are twenty four lines lost at the beginning of this letter

⁴ From the defeat of Xerxes to the Peloponnesian war
Thuc I. 89 ff
196

which you prefer, and I will follow your directions. I am ready to fall in with any suggestions as long as my exploits are set in a bright light by you. Of course you will not overlook my speeches to the Senate and harangues to the army. I will send you also my parleys with the enemy. These will be of great assistance to you.

One thing I wish not indeed to point out to you—the pupil to his master—but to offer for your consideration, that you should dwell at length on the causes and early stages of the war, and especially our ill success in my absence. Do not be in a hurry to come to my share. Further, I think it essential to make quite clear the great superiority of the Parthians before my arrival, that the magnitude of my achievements may be manifest. Whether, then, you should give only a sketch of all this, as Thucydides did in his *Narrative of the Fifty Years' War*,¹ or go a little more deeply into the subject without however expatiating upon it, as you would upon mine in the sequel, it is for you to decide.

In short, my achievements, whatsoever their character, are no greater, of course, than they actually are, but they can be made to seem as great as you would have them seem.²

FRONTO TO MARCUS ANTONINUS

To my Lord Antoninus Augustus³ 165 A.D.

... and to the great exploits

¹ Cf. Cic. *Ad Fam.* v. 12 a letter which Lucius seems to imitate. See also Pliny to Tacitus (iii. 73).

² This is evidently a covering letter to Marcus with the *Principia Historiarum*. The fuller account of the war was presented, owing to Fronto's death in 165 or 167, to Marcus Antoninus (Cass. *Hist.*, 14) refers to Fronto never written.

THE CORRESPONDENCE OF

fratris tui magnis rebus gestis historia non¹ indiligenter scripta nonnihil studii et rumoris additura² sit, sicut ignem quamvis magnum vel levis aura, si adflaverit, adiuverit.

Ubi primum frater tuus commentarium miserit, rem copiose scribere adgrediemur, si tamen hoc quod gusto mittimus non displicebit | . . .³

Ambr 275

(Naber, p 202.)

PRINCIPIA HISTORIAE

<Ad Lucium Verum Imp >

I . . . |⁴ tantas res a te gestas, quantas Achilles gessisse cuperet et Homerus scripsisse ab orationibus nis

<pror>sus vereor nequa novitate aut insolentia rem cantibus et modis absonum quid modulatu et cantu cecinerim⁵

2 | Sallustius⁶ *Eorum profecto uberissima ingenia frustra fuissent, nisi magnificis sese rebus scribendis occupassent, itemque nisi pro magnitudine rerum gestarum scriptorum quoque ingenia congruerent . .*

¹ Instead of non in Hauler (41 Vers d deut. Phil 1890)
pp ² "q" or ³ .

³
⁴
⁵
41
⁶

o Versam
166 ff

¹ A preface to the history of the Parthian war which Fronto was to write from materials supplied to him by Lucius. This we may presume would have had considerable

M. CORNELIUS FRONTO

of your brother a history written in no perfunctory spirit would be likely to add some interest and celebrity, just as the blowing even of a light breeze can fan a fire however great

As soon as your brother sends me his memorandum, I will undertake the writing of a full account, provided however that this, which I send as a foretaste, finds favour

PREAMBLE TO HISTORY¹

FRONTO to LUCIUS VERUS

165 A.D.

1. these great exploits wrought by you such as Achilles himself would fain have wrought and Homer written
I am quite afraid that through some novelty and unusualness I shall have sung something not accordant with songs and measures

2 Sallust . . . *In fact their natural gifts, however rich, would have been of no avail had they not concerned themselves with the writing of their splendid achievements, and likewise were not their talents as writers on a par with the greatness of the deeds*

historical value This preamble covered twenty eight pages of the Codex Fronto praises Lucius extravagantly, setting him even above the great Trajan But much of the eulogy is mere rhetoric, and he seems to have had his eye on a rhetorical commonplace, Livy's sketch of Hannibal The piece is too mutilated for us to be able to judge Fronto's performance fairly, but his account of the virtues and exploits of Lucius does not tally with what we learn of him elsewhere Lucian may be referring to Fronto in his *Quom. Hist. Scrib.* § 19, where he ridicules the contemporary historians of the Parthian war, when he speaks of ἄλλοις τις ἀσέβητος ἐπὶ λόγων δυνάμει

THE CORRESPONDENCE OF

Ambr 265 . . | . . Herculi aerumnæ celebres, si <non re
etiam, disciplinæ²

3 Enimvero fandi agendique laudibus longe pr
stantibus omnium Cato Porcius Rei fac
mter natura: in navium adpiratu deus al
pinnas, ut eas effingeret homo natura tuenda: ren
ergo de natura³

Catus ita Cato⁴ <dat> Agrigentinis aratra, opp
atim stituis ornandus, qui prima acta h<omini
atque> Latini nominis subolem et Italicarum
gines <urbium et ab>originum pueritis illustra
stipendia fecit quantum a stipendius
datum in venando occupatur⁵) . . .

Ambr 268

In the fol
lowing gap
come Ambr
267 269 270

Ambr 272

4 | Imperium populi Romani a Traia
imperatore trans flumina hostilia porrectum . . .
principa<tum> cum pueri et mihi . . .
Liberum amanti et⁶ inculpatum silentium Namq
ceteri mortales praesenti die mentiuntur; scriptoru
mendacri tam culpam quam memoriam merce
sempiternam | humani tu
. . . . fida comminisci parem Na
praesenti die minuunt immo non est . . .
gens certum est fratre⁷

Ambr 271

¹ Mai

² This sentence and all those which are in the next section are from the margin of Cod

³ Hauler gives *Apollō deus tuera dare Ius erg* Mai has *dus* and *tuenda eius* For *Apollō* some verb seem required and Pearce reads *accommodius*, he also suggests *tuenda* and *reius*

⁴ See Plutarch, *V Cato ad inst*

The labours of Hercules famous, if not as facts also, (yet) by way of teaching

3 Indeed for speech and action alike the reputation of Porcius Cato stands far the highest of all Nature the mother of invention* in the equipment of ships God (supplied) the wings of a bird, for man to imitate them by having an eye on nature, the oar therefore is copied from nature

So the acute Cato, worthy of being honoured with statues in every city, gives the Agrigentines ploughs. He shed light on the earliest history of man and the races of the Italian name and the origins of the Italian cities and the childhood of the first inhabitants This Xenophon served campaigns as a volunteer under Cyrus All the leisure left to him from his campaigns he devoted to hunting

4 The Empire of the Roman People was advanced beyond the hostile rivers¹ by the Emperor Trajan
To the lover silence is free and carries no blame
For all other mortals tell present day lies, but the
lies of writers deserve a reprobation as everlasting
as their memory

.

¹ Euphrates and Tigris

² A marginal note on p. 269 of Col. says a eulogy of Trajan was to be found on that page of the Codex. It is not clear whether Hauler found the words *a Traiano imperatore* in the text. ³ For Cod. *est*

The above fragments are from the margin, which also has *Ordo regnorum ante Iomam* (Assyria, Persia, and Macedonia)

Ambr 200 5 [. . . . Macedonum opes torrentis modo magna viortie brevidie occiderunt quorum unius humane prolis actate imperium extinctum est. Nam illa quae Alexandri comites familiaresque tenuerunt, praefecturae magis quam imperia appellandae

6 Nemini usquam oppidum neque tectum diutinum aut linen inveteratum, libertatem inopia sortiti, quia inopem subigendi¹ sterilis fructus laboris capitur vix palantes, nullo itineris destinato sine non ad locum sed ad vesperum contenditur²

Ambr 201 7 <direp>[tiones clades ediderunt, latronum potius quam hostium numero duco Soli hominum Parthi adversus populum Romanum hostile nomen haud umquam contemnendum gesserunt: id satis demonstrat non Crassi modo clades et Antonii foeda fuga, sed etiam fortissimi imperatoris Traiani ductu legatus cum exercitu caesus et principis³ ad triumphum decedentis haudquaquam secura nec incruenta⁴ regressio

8 Bella igitur duo maxima a duobus maximis imperatoribus adversus Parthos nostra memoria pari eventu bellata contendere inter se pro copiis cuiusque ducis et temporis⁵ pergant. haud ignarus fortia

1 171

1
1
1

5 The power of the Macedonians swelling like a torrent with mighty force in a brief day fell away to nothing and their empire was extinguished in the lifetime of a single generation For those portions which were held by the companions and friends of Alexander deserve the name of satrapies rather than of kingdoms

6 Not one of them anywhere has a town or permanent dwelling or settled home they owe their freedom to their poverty, for he who goes about to subjugate the poor gets but a barren return for his labour wandering roving, with no fixed goal of their march, the end of which depends not on locality but on nightfall

7 (those nations whose) plundering raids have caused disasters I class as brigands rather than as enemies The Parthians alone of mankind have sustained against the Roman People the role of enemy in a fashion never to be despised, as is sufficiently shewn, not only by the disaster to Crassus,¹ and the shameful flight of Antonius,² but by the slaughter of a general³ with his army, under the leadership even of Trajan, the stoutest of Emperors, and by the retreat, by no means unharassed or without loss, of that emperor as he retired to celebrate his triumph

8 I will proceed then to compare with one another, in respect to the forces of either leader and either occasion, the two most memorable wars against the Parthians fought with like success in our time, not forgetting withal that the doughty deeds

¹ At Charrae in Mesopotamia, B.C. 53

² Mark Antony in 36

³ Maximus mentioned again below See Dio, lxxviii 29 30

Ambr. 262

5. | Macedonum opes torrentis modo magna vi ortae brevi die occiderunt: quorum unius humanae prolis aetate imperium extinctum est. Nam illa quae Alexandri comites familiaresque tenuerunt, praefecturae magis quam imperia appellandae

6 Nemini usquam oppidum neque tectum diutinum aut limen inveteratum, libertatem inopia sortiti, quia inopem subigendi¹ sterilis fructus laboris capitur vagi pilantes, nullo itineris destinato fine non ad locum sed ad vesperum contenditur²

Ambr 261

7. <direp>|tiones clades ediderunt, latronum potius quam hostium numero duco. Soli hominum Parthi adversus populum Romanum hostile nomen haud umquam contemnendum gesserunt: id satis demonstrat non Crassi modo clades et Antonii foeda fuga, sed etiam fortissimi imperatoris Traiani ductu legatus cum exercitu caesus et principis³ ad triumphum decedentis haudquaquam segura nec incruenta⁴ regressio

8 Bella igitur duo maxima a duobus maximis imperatoribus adversus Parthos nostra memoria pari eventu bellata contendere inter se pro copis cuiusque ducis et temporis⁵ perigam: haud ignarus fortia

¹ Klussmann *subigenti*

² The above three sentences are from the margin

³ Margin adds *ip ius* before *principis*

⁴ The margin has *et laudata*

⁵ Hauler, *Wien Stud* 24, Pt 1, p 529.

5. . . . The power of the Macedonians swelling like a torrent with mighty force in a brief day fell away to nothing: and their empire was extinguished in the lifetime of a single generation. For those portions which were held by the companions and friends of Alexander deserve the name of satrapies rather than of kingdoms

6. Not one of them anywhere has a town or permanent dwelling or settled home: they owe their freedom to their poverty, for he who goes about to subjugate the poor gets but a barren return for his labour wandering, roving, with no fixed goal of their march, the end of which depends not on locality but on nightfall

7. (those nations whose) plundering raids have caused disasters I class as brigands rather than as enemies. The Parthians alone of mankind have sustained against the Roman People the rôle of enemy in a fashion never to be despised, as is sufficiently shewn, not only by the disaster to Crassus,¹ and the shameful flight of Antonius,² but by the slaughter of a general³ with his army, under the leadership even of Trajan, the stoutest of Emperors, and by the retreat, by no means unharassed or without loss, of that emperor as he retired to celebrate his triumph.

8. I will proceed then to compare with one another, in respect to the forces of either leader and either occasion, the two most memorable wars against the Parthians fought with like success in our time, not forgetting withal that the doughty deeds

¹ At Charrae in Mesopotamia, B.C. 53.

² Mark Antony, in 39

³ Maximus, mentioned again below. See Dio, lxxiii. 29, 30

THE CORRESPONDENCE OF

facinora viventium gravatius, mortuorum gravior,
accipi; favori praeteritis, invideri praesentibus
Namque invidia semper ad superstitem mordens adit
. . . . docuit ut Dempta visque extra posse

Ambr 274

quo visui¹ Ubi primum
magnum ducem republicae poposcit, id est pensis
p<rem> propositis, omnibus Arpinati proprietate aut
Nuisina duritiae ortis ducibus bellicosior extitit
. . . . Parthos Romano sanguine impios . . .

Ambr 278

orbant tranquill² | oratoribus³ . . .

Ambr 252

Quat
xxxvii ends
(N^o 1 or
xxxvi)

atque <hostem> | olim adversus Romanos in
tentum et infestum et instructum bellis exercitatum
<sine> ab insidiis ad dum in
agit ratum, quom ad omne facinus audendum
praeceptis agebatur, nullo iam scelere quod atrocius
auderet reliquo

9 Tum praeterea e<x inst>ruend<o>⁴
datum bellum <explo>randum .

Ad hoc⁵ in bellum profectus est cum cognitis
militibus hostem Parthum contemnentibus, sagit
tarum ictus post ingentia Dacorum faucibus inlata
vulnera despicatui habentibus Multos militum im
perator suo quemque nomine proprio atque castrensi
et ioculari appellabat Pigros⁶ vel corniculo
vel aereo vel partim cuiusque herede
<usu> militari pensiones hostium spoliis feroces,†

¹ About sixteen lines are lost in these lacunae

² All the above on p. 274 from the margin of Cod

³ In the margin here is a note *Laegyricus Vologasi* (i.e.
the Parthian king)

⁴ Nine letters

of the living are listened to in a more grudging, of the dead in a more generous, spirit; that the past are regarded with partiality, the present with envy. For as long as a man lives snarling envy is ever at his side

As soon as ever the state called for a great leader, that is to say a man who was equal to the task before him, there appeared one who was more warlike than all the leaders reared in the needy homes of Arpinum¹ or the hardy ways of Nursia² Parthians stained with Roman blood

. an enemy of old, resolved and dangerous, and prepared to meet the Romans, trained in wars verily from ambush when he was hurried headlong into daring any wicked deed, no crime more outrageous being now left for him to dare

9. Then besides

. He set out for the war with tried soldiers who held the Parthian enemy in contempt, making light of the impact of their arrows compared with the gaping wounds inflicted by the scythes of the Dacians. Numbers of his soldiers would the emperor³ call each by his own name, aye, and by any humorous nickname of the camp. Those who hung back with a helmet decoration or bronze or partly by military custom payments proudly gained from spoils of the enemy such as, though victorious and celebrating

¹ Marius ² Vespasian.

³ He is speaking of Trajan. See Pliny, *Paneg.* 15

¹ Seven lines are lost from *datum*.

² From here to the end of p. 262 are thirteen lines.

THE CORRESPONDENCE OF

Ambr 231 quis saepe victor et triumphos celebrans vinctis
legatis invidisset.¹

10. Lucio Parthis aut dilectu novi Quirites sumendi fuerunt aut fortissimi ex subsignatis deligendi militibus tristi et molli milita corruptis. Namque post imperatorem Traianum disciplina propemodum exercitus crebrant, Hadriano et amicis cogendis et facunde appellandis exercitibus satis impigro,² et in summa instrumentis bellorum; quin provincias manu Traiani captas variis bellis ac nunc³ constituendas omittere maluit quam exercitu retinere. Tui itinerum monumenta videas per plurimas Asiae atque Europae urbes sita, cum alia multa tum sepulchra ex saxo formata.

Non solum in gelosis sed etiam in alias meridionalis sedis terris profectus est saluti his provinciis, quas trans Euphratis et Danuvii ripas sitas Traianus spe Moesiae et Asiae provinciae addere posse se imperio Romano adnexuerat. Has omnes provincias, Daciam et Parthis amissas partes, ultro restituit. Exercitus in Asia se pro scutis atque gladius salibus sub pellibus delectare: ducem neminem umquam post eiusmodi vidit.

¹ For the whole of this passage see Hauler, *Serta Hartel* 1898, p. 266. For *feroces* Bralman reads *teretes*, and for *spoliis, gratias* query *paratas*. For *celebrans* m¹ has *emeritis*, which seems required as well as *celebrans*. I have read *quod* for Hauler's *quo*, to make a translatable sentence.

² Hauler reads *inimicus* (against Mai and Brakman), with what meaning is not clear, and *ad* for *et*. Mai gave *sui*

M. CORNELIUS FRONTO

triumphs, he had often grudged brave men, his generals (who had served him well)

10 Lucius had either to take new citizens by a levy for the Parthian war, or out of the reserve legionaries, demoralized by dull and lax service, choose the stoutest men. For after the Emperor Trajan's time the armies were almost destitute of military training, Hadrian being energetic enough in mobilizing his friends and eloquently addressing his armies and generally in the appliances of war. Moreover he preferred to give up,¹ rather than to hold with an army, the provinces which Trajan had taken in various wars, and which now required to be organized. Records of his progresses one can see set up in many a city of Asia and Europe, as well tombs² built of stone as many others.

He made his way not only into frozen lands, but also into others of a southern situation, to the advantage of those provinces which, lying beyond the Euphrates and the Danube, Trajan had annexed to the Roman Empire with the hope that he could add them to Moesia and the province of Asia. These entire provinces, Dacia and the parts lost by the Parthians, Hadrian voluntarily restored. His armies in Asia he amused with "sallies" in the camp instead of with swords and shields: a general the like of him the army never afterwards saw.

¹ See Spart. *Hadrian* 5 and Aug. *De Civ. Dei*, iv 29.

² Such as the *Moles Hadriana* at Rome, and perhaps the tomb of Antoninus in the Campus.

impigro sed a summa . . . bellorum, where the *sed* seems to introduce a point in which Hadrian was deficient. With Hauler's reading we have to supply this deficiency mentally.

* Brakman. Hauler has *nono*.

M CORNELIUS FRONTO

11 The same devotion to peace is said to have withheld him from action absolutely justified, so that in his freedom from empty ambition he is clearly comparable in all the line of Roman Emperors to Numa alone

Peace that the state should be governed by him nor being enamoured of a new war against the Parthians, so by long unfamiliarity with fighting the Roman soldier was reduced to a cowardly condition. For as to all the arts of life, so especially to the business of war, is sloth fatal. It is of the greatest importance also for soldiers to experience the ups and downs of fortune, and to take strenuous exercise in the open

12 The most demoralized of all, however, were the Syrian soldiers, mutinous, disobedient, seldom with their units, straying in front of their prescribed posts, roving about like scouts, tipsy from noon one day to the next, unused even to carrying their arms, and, as from dislike of toil they left off one arm after another, like skirmishers and slingers half naked. Apart from scandals of this kind, they had been so cowed by unsuccessful battles as to turn their backs at the first sight of the Parthians and to listen for the trumpet as the signal for flight.

13 This great decay in military discipline Lucius took in hand as the case demanded, setting up his own energy in the service as a pattern.¹ Marching in person at the head of his troops, he tired himself with trudging on foot quite as often as he rode on horseback, he made no more of the blazing sun

¹ *Maximianus Iulius description of Hannibal* xxi 24) and *Lucius Iulius* cf. *Tacitus*, 13.

THE CORRESPONDENCE OF

facile quam diem serenum ferre, pulverem confer-
tum pro nebulis pati, sudorem in armis ut in ludicris
insuper habere, caput apertum soli et imbribus et
grandini et nivibus neque vel¹ adversus tela mun-
tum praebere, spectandis in campo militibus operam
dare et regiones intēvisere, non incuriose per militum
contubernia transire, sed forte temere Syrorum mun-
ditias Pannoniorum inscitias introspicere², de cultu
cuiusque ingenium arbitrari Sero ipse post decisa
negotia lavatus³ mensa sobria, victu in castris
plebeio vinum loci, aquam temporis bibere primam
vigiliam facile vigilare postremam iamdudum exper-
gitus opperiri labore magis quam otio laetari otio
ad laborem abuti vacua militaribus tempora civili-
bus negotiis occupare In penuria subita ramis non
numquam et frondibus pro⁴ supellectile usus est
crespitem interdum ut torum incubans Somnum
cepit labore paratum non silentio quaesitum Graviora
denum perverse facta severe animadvertit, leviori
sciens dissimulavit locum poenitendi reliquit Nam
|delicta sui plerique, dum ignorari putant, cor-
rigunt ubi manifesta sciunt, impudentia obfirmantur
. . . certaminis fuga . . . necessitatis . . .
<vol>uisset providere per tot provincias, tot ob-
sidionum proeliorum arcium stationum castellorum
excidendorum aperta discrimina curas et consilia dis-
pergere non luxuriis ducenta tametsi profudit spolia⁵

¹ n¹ alle se: so Mal

² In Cod. follows *munditias*

³ m la la Naber reads *lirari*

⁴ For Cod *proprie*

⁵ From here to the end of Ambr 266 fourteen lines

M. CORNELIUS FRONTO

than of a bright day; the choking dust he put up with like a mist; sweating under arms he minded as little as sweating at athletics; he left his head exposed to sun and shower and hail and snow, and unprotected even against missiles, he was careful to inspect the soldiers in the field, and go the round of the sick, he visited the soldiers' quarters with no unobservant eye; cast a casual but keen glance at the Syrians' dandy ways and the gaucheries of the Pannonians; from each man's manner of life he divined his character. After all his business done,¹ he took a belated bath himself. his table plain, his food the common camp fare; his drink the wine of the locality, the water of the season, he keeps the first watch easily, for the last he is awake long beforehand and waiting, work is more to his taste than leisure, and his leisure he misuses for work. time not required for military duties he devotes to civil business. In a sudden emergency he has utilized boughs on occasion or leaves by way of bedding, stretching himself at times on the turf as his couch. The sleep he took was earned by toil, not wooed with silence. The more serious misdemeanours only did he punish severely, the more trifling ones he knew how not to see. he left room for repentance. For many a man corrects his own faults, while he thinks them unperceived; when he sees that they are known, he brizens them out²
., through so many provinces, so many open dangers of sieges, battles, citadels, ports, and fortresses stormed, he lavished care and counsels, not luxuries, though he showered upon them a

¹ Hor. *Ep.* L. vii. 59

² *cp.* Dio, lii. 34.

THE CORRESPONDENCE OF

. . . . Num consentirem de legi<on>ibus
 Ambros 235 anxius fuit cura¹ | . . . gnarus de
 legioni<bus>² portare longior mora
 imperator³ quam ob rem
 etiam tum iunioris decere quo minus ad
 Ambros 246 triumphum⁴ habitus | spectes⁵

14 Lucius consiliorum sollertia longe <praestan
 tior> sciret catafractos similes esse beluis
 piscibus, eis eludere alto mari cernuantes . . .
 in magnis persultare campestribus.⁶ Equi lubrico
 instabiles, manus frigore irritae, arcus umbris
 enerves Paucis ante diebus Lucius ad Volo
 Ambros 245 gaesum | litteras ultro dederat, bellum si vellet con
 dicionibus poneret, dum oblatam pacem spernit
 barbarus male mulctus est

Ea re dilucide patet, quanta Lucio cura insita sit
 militum salutis, qui gloriae suae dispendio redimere
 cupiverit pacem incruentam Traiano suam potiozem
 gloriam sanguine⁷ militum futuram de ceteris eius
 studis multi coniectant, nam saepe Parthorum
 legatos pacem precantes dimisisse inritos

15 Iustitiae et clementiae fama apud barbaros
 sancta de Lucio Traianus non omnibus aequè pur
 gatus Regnum fortunasque suas in fidem Lucii con
 tulisse neminem paenituit, Traiano caedes Partham

¹ These words from the margin

² *ib d*

³ A marginal note says *cuiusmodi su ut hostes Parthi.*

⁴ *ib d piqueqz ius Traiani*

⁵ The margin has *de Parthorum belli more*

thousand spoils

14. Lucius in the skilfulness of his measures far superior knew that the mail-clad troops were like finny monsters, that diving headlong in the deep sea they escape to prance about on the wide champagn. Horses without firm footing on the slippery ground, hands numbed with cold, bows limp with the rain A few days before Lucius of his own accord had sent a letter to Vologaesius to put an end to the war by agreement, if he would; but the barbarian, while he spurned the offer of peace, paid dearly for it.

This fact shews clearly how much Lucius had the lives of his soldiers at heart, ready as he was to purchase a bloodless peace at the price of his own glory. With Trajan, as many judge from the rest of his ambitions, his own glory was likely to have been dearer than the blood of his soldiers, for he often sent back disappointed the ambassadors of the Parthian king when they prayed for peace.

15. The reputation, too, of Lucius for justice and clemency¹ was unblemished among the barbarians. Trajan was not equally cleared in the eyes of all. No one had reason to repent having trusted his kingdom and fortunes to the good faith of Lucius: it is not easy to absolve Trajan from the murder of a suppliant

¹ The *bonitas* of Lucius is mentioned several times by the historians

² These words are from Hauler. The margin has *Laus Traiani*.
³ Cod. in sanguine.

THE CORRESPONDENCE OF

nisi quod armis etiam Spartacus et Viriathus aliquantum potuere, precis artibus vix quisquam Truano ad populum, si qui adaeque, acceptior extitit. Ipsa haec cum pri¹ ac nonne illis optrectationibus fices sunt? Ex summa civilis scientiae ratione sumpti videntur, ne lustrionum quidem ceterorumque scenae aut circi aut harenarum artificum indiligentem principem fuisse, ut qui sciret populum Romanum duabus praecipue rebus, annona et spectaculis, teneri, imperium non minus ludicris quam serius probari, maiore damno seria, graviore invidia ludicra neglegi, minus acerbis stimulis congiari quam spectacula expeti, congiariis frumentariam modo plebem singillatim placari ac nominatim, spectaculis universum <populum conciliari> Quod se oportet namque ut famem . . . plane Neptunum Martemque molestias illas sibi est arceant non magis aut avis vocem quam ludis spectaculorumque caerimonius placari. Ei rei pompas et carpenta et tensas et exuvias a maioribus dicatas, elephantos, uros populus Romanus usus sit spectaculis deserti constrepi aut linguis pluribus ominari. Haec a me detrectationis refutandae causa memorata sunt.

18 Ceterum Lucius autem ipse, quoquo in

¹ Four letters only are missing. Query *cum praecipue* Pearce suggests *Comprobanda*

THE CORRESPONDENCE OF

loco gestum quid foret, ad senatores scripsit litteris diserte ad significandum rerum¹ statum compositis, ut qui facundiam impenso studio restaurare (vellet) proavus seu pronepos virtute praestare videbitur, compurationis quidem discrimen in familiae nomine permanebit²

Ambr 20,
Ambr 249

Ad Antoninum Imp ii 7 (Naber, p 111)

MAGISTRO meo

Orationes desiderat sibi Dominus frater a me vel a te quam primum mitti Sed ego malo, mi magister, tu mittas, easque ut in promptu haberes, exemplaria quae apud nos erant misi tibi Ego mox alia conficiam | quae e<x> eo sine in<genti> mora intercedente³ alia mihi scripserint Vale mi dulcissime magister Nepotem saluta

Ambr 72
follows g 90

Ad Antoninum Imp ii 9 (Naber, p 112)

| DOMINO meo

Has interea orationes mittito In le<gendo> duas delig<am Domino fratri tuo mittendas>⁴

¹ This word, according to Hauler, is doubtful Query *belli*

² In the Codex follow the words *Legi emendari qui supra Principia Historiarum Frontonis* ³ Heindorf for *intercedente*

⁴ A addition by Alan to supply the four words *Mai eava* are miss: g (so Naber), but in his 1823 edition Mai says half a column is lost

After this letter follow two letters, *Domino meo* and *Magna*

Al 1 r 72
del f 4

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anything had been done, wrote to the Senate despatches expressly composed to describe the state of affairs, as one who had the rehabilitation of eloquence deeply at heart If any one reads the accounts side by side, as to whether the great-grandfather or the great-grandson shall appear to be first in merit, however the question of superiority be decided, the difference will only be a family matter

MARCUS ANTONINUS TO FRONTO

165 A.D

To my master.

The Lord my brother desires that the speeches should be sent to him as soon as possible by me or by you I should prefer, my master, for you to send them, and that you might have them ready at hand I have sent you the copies I have by me. I shall soon get others made which without the interposition of any great delay, will write me others Farewell, my sweetest of masters My love to your grandson.

FRONTO TO MARCUS ANTONINUS

165 A.D.

To my Lord

Meanwhile send me the speeches In looking them through I will choose two to be sent to your brother.

tro meo salutem, illegible except for a word here and there They are contained on Ambr. 71 (Naber, p 112) Moreover the words, given by Naber, p 107, at the beginning of *Ad Anton* 11 6 (Ambr 143, col 2), do not appear to belong to that letter, and I give them here as read by Brakman *Vel a <te> risum quanta sollicitudinem <mihî adferant> ita deo id ago explora diligentius* They are from a letter of Fronto's and refer, perhaps, to his grief.

THE CORRESPONDENCE OF

Ad Antoninum Imp II 8 (Naber, p 111).

DOMINO meo

Pro cetera erga me benivolentia tua fecisti, quod orationum, quas frater tuus Dominus noster desideraverat, mittendum me gratiam inire voluisti. Adiunxi ultro ego tertiam orationem pro Demonstrato¹ Petiliano, de qua illa scripsi. *Adiunxi, inquam, orationem pro Demonstrato, quam quom primum fratri tuo optuli, didici ex eo Asclepiodotum, qui oratione ista compelleretur, a te non improbari. Quod ubi primum comperi, curavi equidem abolere orationem. Sed iam perierat in manus plurium quam ut aboleri posset. Sed quid fiat postea? Quid, inquam, fiat? nisi et Asclepiodotum, quia <tu> probasti,² mihi quoque fieri amicissimum, tam hercle quam est Herodes summus nunc meus, quamquam extet oratio.* Vale mi Domine dulcissime

De Nepote Amisso, 1 (Naber, p 231)

| MAGISTRO meo salutem

Modo cognovi de casu. Quom autem in singulis articulorum tuorum doloribus torqueri soleam, mi magister, quid opinaris me pati quom animum doles? Nihil conturbato mihi aliud in mentem venit quam

¹ So Co I. Hauler, who says there are other variations in the preceding lines, which he does not record

² See Hauler, *Hier Stud* 28, Pt. 1, p 169

³ Demonstratus appears twice as an accuser of Heroles in the year 142 (for the trial see 160 ff.), and again in 170, as we learn

M CORNELIUS FRONTO

FRONTO TO MARCUS ANTONINUS

To my Lord

165 A D

It is in keeping with all your other kindness towards me that you wish me to oblige my Lord your brother by sending him the speeches which he asked for. I have taken the liberty of adding a third speech, that for Demostratus Petilianus,¹ about which I have written to him as follows. *I have added the speech for Demostratus, but on submitting this to your brother² I learnt from him that Asclepiodotus, though he is taken to task in that speech, is not thought ill of by you. As soon as I was aware of this I did my best to have the speech suppressed. But it had already been circulated too widely to be called in. What is to be done next? What, I say, to be done, except that Asclepiodotus too since he has earned your approbation, should become a very dear friend of mine also, just as by heaven Herodes and I are now on the best of terms, in spite of the speech being extant.* Farewell, my most sweet Lord

MARCUS ANTONINUS TO FRONTO

To my master, greeting

165 A D

I have just heard of your misfortune. Suffering anguish as I do when a single joint of yours aches, my master, what pain do you think I feel when it is your heart that aches? Under the shock of the news I could think of nothing else than to ask you

from Philostratus, who also tells us that he wrote speeches against Herodes. The speech of Fronto here mentioned may also be the one against Herodes spoken of above (165) but the allusion reads as if it were a recent one

¹ i.e. Marcus

THE CORRESPONDENCE OF

rogare te ut conserves mihi dulcissimum magistrum, in quo plura solacia vitae huius habeo <quam> quae tibi tristitiae istius possunt ab ullo contingere

Mea manu non scripsi, quia vespere¹ loto tremebat etiam manus Vale mi iucundissime magister

De Nepote Amisso, 11 (Naber, p. 232)

Ambr 150

ANTONINO AUGUSTO | Fronto

1 Multis huiusmodi maeroribus fortuna me per omnem vitam meam exercuit Nam ut alia mea acerba omittam, quinque amisi liberos miserrima quidem condicione temporum meorum, nam quinque omnes unumquemque semper unicum amisi, has orbis tatis vices perpassus, ut numquam mihi nisi orbato filius nasceretur Ita semper sine ullo solacio res duo liberos amisi, cum recenti luctu procreavi

2 Verum illos ego luctus toleravi fortius, quibus egomet ipse solus cruciabar Namque meus animus meomet² dolori obnixus, oppositus quasi solitario certamine, unus uni par pari resistebat At no<n iam> ego <uni> vel soli <obsto>, dolor e<nim> e dolore acri multiplicatur et cumulum luctuum meorum diutius ferre nequeo;³ Victorini mei lacrimis tabesco, conliquesco Saepe etiam expostulo cum deis immortalibus et fata iurgio compello

¹ Charisius *Art Gram* ii 223-26 (Kiel), quotes from the fifth book of letters *Ad Antoninum*, at *nim vespere* in *luctum nullam* I saw here Marcus always uses *vespera*

² Haupt for Cod. *meum*

³ In this passage I follow Brakman, filling up the gaps as best I can

to keep safe for me the sweetest of masters, in whom I find a greater solace for this life than you can find for your sorrow from any source

I have not written with my own hand because after my bath in the evening even my hand was shaky Farewell, my most delightful of masters

*On the loss of his Grandson*¹

165 A D

FRONTO to Antoninus Augustus

1 With many sorrows of this kind has Fortune afflicted me all my life long For, not to mention my other calamities, I have lost five children under the most distressing circumstances possible to myself For I lost all five separately, in every case an only child, suffering this series of bereavements in such a way that I never had a child born to me except while bereaved of another So I always lost children without any left to console me and with my grief fresh upon me I begot others

2 But I bore with more fortitude those woes by which I myself alone was racked For my mind, struggling with my own grief, matched as in a single combat man to man, equal with equal, made a stout resistance But no longer do I withstand a single or solitary opponent, for grief upon bitter grief is multiplied and I can no longer bear the consummation of my woes, but as my Victorinus weeps, I waste away, I melt away along with him Often I even find fault with the immortal Gods and upbraid the Fates with reproaches²

¹ This grandson may be the one who died aged three, in Germany (see *Ad Albiu* II 9 10 below).

² See Marcus, *Trogus*, II 2, 3, 13 16 iv 3, 32, vi 4^o etc.

3. Victorinum pietate mansuetudine veritate innocentia maxima, omnium denique optimarum artium præcipuum virum acerbissima morte filii afflictum, hocine ullo modo æquum aut iustum fuit? Si providentia res gubernantur, hoc idem¹ | recte provisum est? Si fato cuncta humana decernuntur, hocine fato decerni debuit? Nullum ergo inter bonos ac malos fortunarum discrimen erit? Nulla deis² nulla fati diiudicatio est, quali viro filius eripatur? Facinorosus aliquis³ et scelestus mortalis, quem ipsum numquam nasci melius foret, incolumes liberos educit, in morte sua superstites relinquit Victorinus vir sanctus, cuius similes quam plurimos gigni optimum publicum fuerit, carissimo filio privatus est. Quæ, malum, Providentia tam inique prospicit? Fata a fando appellata aiunt. hocine est recte fari? Poetae autem colus et fila fati assignant nulla profecto tam sit importuna et insciens lanifica, quæ herili togæ solidum et nodosum, servili autem subtile et tenue subtemen neverit. Bonos viros luctu adfici, malos re familiari incolumi frui, neque mensum neque pensum fatorum lanificum³ duco

4. Nisi forte alius quidem nos error iactat et

¹ m² *hocine*

² Niel ulr for Cod *dies*.

³ Ehrentthal *lanificum*

3 Victorinus, a man of entire affection, gentleness, sincerity, and blamelessness,¹ a man, further, conspicuous for the noblest accomplishments to be thus afflicted by his son's most untimely death, was this in any sense just or fair? If Providence does govern the world, was this too rightly provided? If all human things are determined by Destiny, ought this to have been determined by Destiny? Shall there, then, be no distinction of fortunes between the good and the bad? Have the Gods, have the Destinies no power of discrimination as to what sort of man shall be robbed of his son? Some thoroughly vicious and abandoned wretch, who had far better himself never been born, rears his children safely and leaves them at his death to survive him. Victorinus, a blameless man, is bereaved of his darling son, and yet it would have been in the highest interests of the state that as many as possible of his kind should be born. Why Providence—out upon it!—if it provides unfairly? The Destinies, they say, are called so from the word "to destine" is this to destine rightly? Now the poets assign to the Destinies distaffs and threads. Surely no spinner would be so perverse and unskilful as to spin for her master's toga a heavy and knotty yarn, but for a slave's dress a fine and delicate one. For good men to be stricken with sorrow while the bad enjoy every domestic felicity—such a spinning performance by the Destinies I hold to be neither by weight nor rate.²

4 Unless maybe quite another error throws us

¹ See Dio, lxxii 11

² *cp* Psalms, xvii 14

³ *Lat task weighed or measured*. It would almost do to translate it "neither in rhyme nor reason."

THE CORRESPONDENCE OF

ignari rerum, quae mala sunt quasi prospera concupiscimus, contra quae bona sunt pro adversis aversamur, et mors ipsa, quae omnibus luctuosa videtur, pausam laborum adfert et sollicitudinum et calamitatum miseris[imisque] corporis vinculis liberatos ad tranquilla nos et amoena et omnibus bonis referta animarumque conciliabula travelit Hoc ego ita esse facilius crediderim quam cuncta humana aut nulla aut iniqua providentia regi

5 Quodsi mors gratulanda potius est hominibus quam lamentanda, quanto quisque eam natu minor adeptus est, tanto beator et dis acceptior existimandus est, ocius corporis malis exutus, ocius ad honores liberae animae usurpandos excitus¹ Quod tamen verum sit licet, parvi nostra refert qui desideramus amissos nec quicquam nos animarum immortalitas consolatur, qui carissimis nostris dum vivimus caremus Istum statum vocem formam auram² liberam quaerimus, faciem defunctorum miserandam maeremus, os obseratum, oculos eversos, colorem undique deletum Si maxime esse animas immortales constet, erit hoc philosophis disserendi argumentum, non parentibus desiderandi remedium

6 Sed utcumque sunt ista divinitus ordinata,

¹ For *Coel* *excl* *is*

² Or = *animam* (*πνεύμα*)

out, and through ignorance of the facts we are coveting what is evil, as though it were to our advantage, and, on the other hand, turning away from what is good, as though it were to our harm,¹ whereas death itself, which seems grievous to all, brings rest from toil and care and trouble, and freeing us from these most wretched fetters of the body transports us to those serene and delightful assemblies of souls where all joys are to be found. I would more readily believe that this is so than that all human things are governed either by no Providence or by one that acts unfairly.

5 But if death be rather a matter for welcome than for mourning, the younger each one attains to it the happier must he be accounted and the greater favourite of the Gods,² released as he will have been the sooner from the ills of the body, and the sooner called forth to inherit the privileges of an enfranchised soul. Yet all this, true though it be, makes little difference to us who long for our lost ones, nor does the immortality of souls bring us the slightest consolation, seeing that in this life we are bereft of our best-beloved ones. We miss the well known gait, the voice, the features, the free air, we mourn over the pitiable face of the dead, the lips sealed, the eyes turned, the hue of life all fled. Be the immortality of the soul ever so established, that will be a theme for the disputations of philosophers, it will never assuage the yearning of a parent.

6 But however these things have been ordained

¹ *cp* Marcus, *Thoughts* iv 58, ix 2, x 36

² *ibid* ii 11, vi 44

³ *cp* the well known fragment of Menander, *ὅν οἱ θεοὶ φιλοῦσιν ἀποθνήσκει νεοί*

THE CORRESPONDENCE OF

Ambr 180 mihi quidem neutiquam diutinam adferent sollicitudinem, cui tam propinqua mors Sive in aeternum extingui mur, olim cupienti | mihi, tandem . . . tu acerbiore . . . neque arborum neque . . . eodem tempore . . . heres tuus . . . ad vin demiam . . . isto tempore . . . asperius, nequi vi prae fletu | ac dolore Meus etiam hic mi¹ dulcissimus nepos, quem ipse sinu meo educo, hic est profecto, qui me magis inigisque lacerat et excruciat Namque in huius facie illum amissum contemplor, exemplum oris imaginor, sonum vocis eundem animo fingo Hanc sibi dolor meus picturam commentatur Verum defuncti vultum ignorans, dum verisimilem coniecto, maceror.

Ambr 179 7 Sapiet mea filia viro omnium quantum est hominum optimo adquiescet is enim consolabitur pariter lacrimando pariter suspirando <pariter>² loquendo pariter conticiscendo Senex ego parens indigne consolabor, dignius enim foret ipsum me ante obuisse Neque ulli poetarum carmina aut sapientium praecepta tantum promoverint ad luctum filiae meae secundum et dolorem leniendum quantum maiori vox³ <ex> ore carissimo et pectore iunctissimo profecta

Ambr 182 8 Me autem consolatur aetas mea prope iam edita et morti proxima Quae quom aderit, si noctis si lucis id tempus erit, caelum quidem consalutabo discedens et quae mihi conscius sum protestabor nihil in longo vitae meae spatio a me admissum]

¹ Heindorf for Cod *huc me* ² Naber
³ Naber Cod *has uxor & carissimio pectore*

M CORNELIUS FRONTO

from heaven, to me indeed, for whom death is so near, they can by no means bring any lasting perplexity. Whether we are annihilated for ever, as I once desired, at last I was unable for grief and tears. Now it is even my darling grandson, whom I am bringing up myself in my own bosom, it is he, indeed, who more and more rends and racks my heart. For in his lineaments I behold the other whom I have lost, I seem to see a copy of his face and fancy that I hear the very echo of his voice. This is the picture that my grief conjures up of itself. But not knowing the dead child's face I fret myself away with imagining what he was like.

7 My daughter will be reasonable, she will rest upon her husband's love, and he is the best of men. He will comfort her by mingling his tears and sighs with hers, by speaking when she speaks and being silent when she is silent. It will scarce besit me, her aged father, to comfort her, for it were more fitting had I myself been the first to die. Nor would any poet's songs or philosopher's precepts avail so much to assuage my daughter's grief and soothe her pain as her husband's voice issuing from lips so dear and a heart so near her own.

8 My comfort, however, I find in my life being almost spent and death very near. When it comes, be its advent by night or by day, yet will I hail the heavens as I depart and what my conscience tells me I will testify,¹ that in my long span of life I have been guilty of nothing dishonourable, shameful, or

¹ Charisius, in his *Ars Grammatica* quotes from Fronto's second book of letters to Antoninus: *Male me, Marce, praeteritae vitae meae paenitet*

THE CORRESPONDENCE OF

quod dedecori aut probro aut flagitio foret, nullum in aetate agunda varum, nullum perfidum facinus meum extitisse, contraque multa liberaliter multa amice multa fideliter multa constanter saepe etiam cum periculo capitis consulta Cum fratre optimo concordissime vixi, quem patris vestri bonitate summos honores adeptum gaudeo, vestra vero amicitia satis quietum et multum securum video Honores quos ipse adeptus sum numquam improbis rationibus concupivi Animo potius quam cor poru curando operam dedi Studia doctrinae rei familiari meae prietuli Piuperem me quam ope cuiusquam adiutum, postremo egere quam poscere malui

9 Sumptu numquam prodigo fui, quaestu¹ interdum necessario Verum dixi sedulo, verum audiui libenter Potius duxi negligi quam blandiri, tacere quam fingere, infrequens amicus esse quam frequens adsentitor Pauca petui, non prauca merui Quod cuique potui pro copia commodavi Merentibus promptius, immerentibus audacius opem tuli Neque me parum gratus quispiam repertus segniorem effecit ad beneficia quiccumque possem prompte imperti

¹ Both text and margin have *quaestus*.

M. CORNELIUS FRONTO

criminal, my whole life through there has not been on my side a single act of avarice or of treachery, but on the contrary many of generosity, many of friendship, many of good faith, many of loyalty, undertaken, too, often at the risk of my life. With the best of brothers I have lived in the utmost harmony, and I rejoice to see him raised by your father's kindness to the highest offices and resting in the friendship of both of you in all peace and security. The honours which I myself have attained¹ I never coveted to gain by unworthy means. I have devoted myself to the cultivation of my mind rather than my body. I have held the pursuit of learning higher than the acquisition of wealth. I preferred to be poor² rather than indebted to another's help, at the worst to be in want rather than to beg.

9 In expenditure I have never been extravagant, sometimes earned only enough to live upon. I have spoken the truth studiously, I have heard the truth gladly. I have held it better to be forgotten than to fawn, to be silent than insincere, to be a negligent friend than a diligent flatterer. It is little I have sought, not a little I have deserved. According to my means I have obliged every man. The deserving have found in me a ready, the undeserving a more quixotic, helper. Nor if I found anyone ungrateful, did that make me less willing to bestow upon him betimes all the services in my power, nor

¹ In a letter from the fourth book of letters *Ad fratres in Troia*, quoted by Clarissius, *Ant. Crat.* 11. 19^m, 3. Kiel. Fronto says *Si is a'nd que decorum est quæ iusti ac i'no tribu'.*

² He could not have been very poor, see A-L Ge' 11. 1. 11.

THE CORRESPONDENCE OF

- Ambr 181 endi Neque ego umquam ingratis offensior | fui
 Eas quid¹ mihi nec ob aeritos in re
² omnibus cum putavi cuperem
 equidem male Finem teneo
 male quam Si nobis carere
 operam Sentio me proderes quum
 Ambr 196 leto colens et statu mentis | doleam
 aliud reperto apud sana
 Col 1, line 7 mundum solvere | non est veritatis
 nostri cum ii se indigere solacio Dis placeat
 filiam generum domo bis
 hinc de quorum vastitatem
 Ambr 195 10 | Multum et graviter male³ valui, mi Marce
 carissime Dein crasibus miserrimis afflictus, tum
 uxorem amisi, nepotem in Germania amisi, miserum
 me¹ Decimum nostrum amisi Ferreus si essem,
 plura scribere non possem isto in tempore
 Labrum⁴ misi tibi quem pro omnibus haberes.

Ad Verum Imp ii 9 (Naber, p 137)

DOMINO meo Vero Augusto

Fatigatum me valetudine diutina et praeter
 solitum gravi ac gravissimis etiam luctibus piene
 continuis afflictum, nam in paucissimis mensibus et
 uxorem carissimam et nepotem trimulum amisi—sic
 his plerisque me malis perculsum,⁵ recreatum | tamen
 aliquantum fateor, quod te meminisse nostri et quae-
 dam nostra desiderasse cognovi Misi igitur quae

¹ Six letters lost

² So Cod Brakman

³ Five letters lost

⁴ Query = lib II m, a letter

⁵ Hauler *It. n. Stud* 21, Pt 1, p 232. I have pre-
 ferre | sic to | is sed Brakman, *Ita fessum <m> e malis per-
 mulum recreatumque.*

M. CORNELIUS FRONTO

have I ever been vexed by the ungrateful

10 I have suffered from constant and serious ill-health, my dearest Marcus. Then afflicted by the most distressing calamities I have further lost my wife, I have lost my grandson in Germany—woe is me!—I have lost my Decimus¹. If I were of iron I could write no more just now.

I have sent you a book which you can take as representing all my thoughts.

FRONTO TO LUCIUS VERUS

165 A D

To my Lord Verus Augustus

Worn out as I am with long-continued and more than usually distressing ill-health, and afflicted besides with the most distressing and almost uninterrupted sorrows, for in a very few months I have lost both the dearest of wives and a three-year-old grandson²—though thus prostrated by these accumulated evils, I confess that I was nevertheless not a little cheered to learn that you had not forgotten me and wished for something of mine. I therefore send

¹ Some think this is the grandson's name

² See the preceding letters *De Nepole*

THE CORRESPONDENCE OF

Dominus meus frater tuus litteris tuis admonitus mittenda censuit. Adiunxi praeterea orationem pro Demonstrato, quam quoni fratri tuo primum optuli, didici ex eo Asclepiodotum, qui oratione ista compelletur, a te non improbari. Quod ego ubi compencupivi¹ equidem abolere orationem sed iam pervaserat in manus plurium quam ut aboleri posset. Quid igitur fieri, quid, inquam, oportet²? Nisi Asclepiodotum, quom a te probetur, mihi quoque fieri anucissimum, tunc hercule quam est Herodes summus nunc meus, quamquam extet oratio.

Egit praeterea mecum frater tuus impense, quod ego multo impensius adgredi cupio, et ubi primum commentarium miseris, adgrediar ex summis voluntatis opibus nam de facultate tute videbis, qui me idoneum censuisti.

Ad Verum Imp ii 10 (Naber, p 138)

MAGISTRO meo

Certum esse te, mi magister carissime, etiamsi reticeam, nihil dubito quantae mihi acerbitati³ sit tur omnis vel minima tristitia. Enimvero quom et uxorem per tot annos caram et nepotem dulcissimum paeae simul amiseris, miser<icordiam⁴ . . . maximam pernostique graviora mala quam ut> magistrum doctis dictis consolari audeam, sed patris est pectus

¹ So Hauler for Naber's *cupari*

² So Brakman, but Hauler reads *Quid igitur? quid igitur, inquam probabitur?* ³ Heindorf for Cod *acerbitatis*

⁴ Six lines are lost for this passage see Hauler, *Wochenach*, 41, Oct. 11, 1916

M CORNELIUS FRONTO

what my Lord your brother, acting upon your letter, has decided should be sent I have added besides the speech for Demostratus, but on submitting this to your brother I learnt from him that Asclepiodotus, though he is taken to task in that speech, is not thought ill of by you. As soon as I was aware of this I was myself anxious to suppress the speech, but it had already been circulated too widely to be called in. What then? What then, I say, is best so be done, except that Asclepiodotus, since he has earned your approbation, should become to me also a very dear friend, just as by heaven Herodes and I are now on the best of terms, in spite of the speech being published.

Besides your brother earnestly discussed with me what I am still more earnestly anxious to take in hand and, as soon as you send me your memoranda,¹ I will take the task in hand with the best will in the world for as to my qualifications, you who have judged me capable of it must see to that yourself.

LUCIUS VERUS TO FRONTO

To my Master

165 A D

You are aware I am sure my dearest master even if I keep silence, how keenly I feel every trouble of yours however slight. But, indeed, since you have lost simultaneously both a wife beloved through so many years, and a most sweet grandson and you have known greater woes than I can dare to console my master for with well turned words but it is a father's part to pour forth a

¹ Notes on the conduct of the war mentioned above. *Ad Lucium*, ii 3. See above, p. 194.

THE CORRESPONDENCE OF

amoris pietatisque plenum effundere¹ . .
 delibera Nunc ad reliqua litterarum
 tuarum convertar. Delectatus <sum> ven
 Quid <or>is, mi magister? nisi qui
 a me munus aut defendisset, qua
 si deficiis quid aliud ego doctior² quicquam
 aut expeto aut somnio

Ad Verum Imp ii 4 (Naber, p 132)

| DOMINO meo Vero Augusto

Quamquam me diu³ cum ista valetudine vivere
 iam pridem pigeat taedeatque, tamen ubi te tanta
 gloria per virtutem parta reducem videro, neque in
 cassum vixero neque invitus quantum vitæ dabitur
 vivam Vale, Domine desiderantissime Socrum⁴
 et liberos vestros saluta

Ad Verum Imp ii 5 (Naber, p 132)

MAGISTRO meo

Quidni ego gaudium tuum mihi repraesenta
 verim, mi magister carissime? Equidem videre te⁵
 et arte complecti et multum exosculari videor mihi
 toto

¹ Hauler, *Wien Stud* 24, Pt. 2 p 293 (1918).

² *Querev doctius*

³ Heinlof *d utius* Naber *medius fidius*

⁴ Possibly *uocem* should be read

⁵ Heinlof for Cod *me*.

M. CORNELIUS FRONTO

heart full of love and affection
Now I will turn to the rest of your letter. I was
delighted What do
you ask, my master?
what else at all do I more leuned either ask or
dream of
.

FRONTO TO LUCIUS VERUS

To my Lord Verus Augustus 166 A.D.

Although for a long while past with this ill-health of mine it has been pain and grief for me to live on, yet when I see you return with such great glory gained by your valour, I shall not have lived in vain, nor shall I be loth to live, whatever span of life remains for me Farewell, my Lord, whom I miss so much Greet your mother-in-law¹ and your children

LUCIUS VERUS TO FRONTO

To my Master 166 A.D.

Why should I not picture to myself your joy, my master? Verily I seem to myself to see you hugging me tightly and kissing me many times affectionately

¹ *Socrum* cannot = *socerum* and mean Marcus Faustina must therefore have been with Verus and her daughter Lucilla, but whether in Asia or in Italy is not clear As Lucius married Lucilla in 164, he is not likely to have had
dren would
Therefore
lib-ros, as

verus also seems to shew

THE CORRESPONDENCE OF

Ad Verum Imp II. 8 (Naber, p. 130)

VERO AUGUSTO DOMINO MEO

Ambr 430

. . . . | desideretur is honor, quo pariter quis
que expetit si quid honoris alius impertitum videat
Probasti me laudastique consilium, neque tamen
triduo amplius vel quatrinduo id a te optinere potuisti,
ut mihi verbo *salutem*† responderes, sed ita excogi-
tasti primum me intromitti in cubiculum iubebas,
ita sine cuiusquam invidia osculum dabas, credo ita
cum animo tuo reputans, mihi cui curam cultumque
tradidisses oris atque orationis tuae, ius quoque
osculi habendum, omnesque eloquentiae magistros
sui lege¹ fructum capere solitos² in vocis aditu
locatum Morem denique saviandi arbitror honori
eloquentiae datum Nam cur os potius salutantes
ori admovemus quam oculos oculis aut frontes front-
ibus aut, quibus plurimum valemus, manus manibus,
nisi quod honorem orationi impertimus? Muta deni-
que animalia oratione carentia osculis carent Hunc
ego honorem mihi a te habitum taxo³ maximo et
gravissimo pondere Plurima praeterea tua erga me
summo cum honore et dicta et facta sensi Quotiens

¹ Niebuhr *laboris*

² For *Maia saltem*. Novák prefers *arrium*

³ Brakman for *Cod axo* (query *faxo*); but we should rather expect the genitive after it. But Klussmann *cp Ad M I acc iii* 20 (i p. 172) and reads *habitum maximo grati is amo p.n. lere*

⁴ The loss of the opening words makes it difficult to divine the meaning of the first two sentences There had

M. CORNELIUS FRONTO

FRONTO TO LUCIUS VERUS

To my Lord Verus Augustus

166 A D

. . . .¹ the honour would be missed, whereby equally everyone hankers after any honour bestowed on others. You gave me your approval and applauded my advice, and yet for more than three or four days you could not prevail on yourself to answer me with the word *greeting*†, but you thought out this plan. First you bid me be admitted into your chamber: so you were able to give me a kiss without exciting anyone's jealousy, with this thought I suppose in your mind, that the privilege also of a kiss should belong to me, to whom you had entrusted the care and cultivation of your voice and speech, and that all masters of eloquence by innate right are wont to

we touch lips with lips rather than eyes with eyes or foreheads with foreheads or hands² with hands—and yet these are more indispensable than anything else—if it be not as rendering an honour to speech? In fact, dumb animals being without speech are without kisses also. This privilege kept for me by you outweighs everything in my estimation. Many a time besides have I been sensible of the special honour which you have shewn me in word and deed.

apparently been some jealousy excited among the entourage of Verus at the favour shewn to Fronto. The latter seems to have suggested some plan for obviating this, which Verus had not fallen in with, but followed another course.

¹ Savages rub foreheads and noses. Shaking hands could not have been unknown, as clasped right hands were a common symbol of amity and unity.

THE CORRESPONDENCE OF

Ambr 49 tu manibus | tuis sustinulisti, adlevasti negre adsurgentem aut difficile progredientem per valetudinem corporis paene portasti! Quam hilari vultu semper et plerito tu¹ nos adfatus es! Quam libenter conscripsisti sermonem, quam diu produxisti, quam invitus terminasti! Quae ego pro maximis duco Sicut in exilis inspicienti diffissa plerumque minima et tenuissima maximas significant prosperitates deque² formicarum et apicularum ostentis res maxime portentantur, item vel minimis et levissimis ab uno et vero Principe habitis officii et bonae voluntatis signis significari arbitror ea quae amplissima inter homines et exoptatissima sunt, amor honorque Igitur quaecumque a Domino meo tuo fratre petenda fuerunt, per te petita et impetrata omnia malui

Ad Amicos, i 9 (Naber, p. 180)

Ambr 820,
col 2 ad
med.

| FRONTO Caelio Optato salutem

Sardius Saturninus artissima mihi familiaritate coniunctus est per filios suos doctissimos iuvenes, quos in contubernio mecum adsiduos habeo Magno opere eum tibi, frater, commendo et peto, si quid negotii eum ad te adduxerit,³ carissimum mihi virum omni honore dignum iudices et ope tua protegas

¹ Naber for Cod. *placatisimo*

² See Hauser, *Wien St 1* 25 pt. 1, p. 331 and 24, pt. 1, p. 232, for this passage The words are also found in the margin, but with *ut* for *deque* and *benivolentias* for *bonae vol*

³ For Cod. *eduxerit*.

VI CORNELIUS FRONTO

How often have you supported me with your hands, lifted me up when scarcely able to rise, and well-nigh carried me when hardly able to walk from bodily weakness¹ With what a cheerful and friendly countenance have you always accosted me! How readily engaged in conversation, how long continued it, how reluctantly concluded it! All which I value above measure Just as in the inspection of entrails the smallest and most insignificant parts when laid open generally imply the greatest good-fortune, and by omens from ants and bees the greatest events are foretold, so by even the least and most trivial signs of deference and good will, vouchsafed by the one and very Emperor, are signified, as I think, those things that are the most estimable and the most coveted among men, love and honour Therefore all the favours I have had to ask from my Lord your brother I have preferred to ask and obtain through you

? 166 A D

FRONTO to Caelius Optatus² greeting

There is a bond of the closest intimacy between Sirdius Saturninus and myself through his sons, young men of the highest culture, whom I have constantly under my roof I recommend him to you most cordially, my brother, and ask that, if any business bring him to you, you should judge as worthy of all respect a man very dear to me, and should befriend him with all your power

¹ Fronto suffered from rheumatism but not, it appears as his contemporary Polemo from arthritis

² Was legatus of Numidia in 166, this letter may be to him in his province.

THE CORRESPONDENCE OF

Ad Amicos, l. 10 (Naber, p. 180)

FRONTO Petronio Mamertino¹ salutem.

Ambr 819

Sardius Saturninus filium habet Sirdium Lupum, doctum et facundum | virum, de mei domo meoque contubernio in forum deductum, ad omnes bonas artes a me institutum, frequentissimum auditorem tuumque maximum laudatorem² <nec> minus . . habuit egregias gravissimum mihi cum Sordio Saturnino, qui nos- trae numeres ac diligas

Ad Amicos, l. 20 (Naber, p. 187)

Ambr 281,
col 1 ad
med

| FRONTO Sordio Saturnino salutem

Gravissimum casum tuum recenti malo consolari nequivi periculosa valetudine ipse et in hoc tempus conflictatus, quom quidem mihi languore fesso plu- rium aegritudinum venit nuntius amissi juvenis nostri, quem tibi optimum filium fors iniqua abstulit, mihi iucundissimum contubernalem. Quam ob rem, quam quam recuperata sit commoda valetudo, tristitia tamen inhaeret animo meo magisque in dies augetur maerore Lupi nostri fratrem optimum misere desi- derantis. Quom³ praesentem ac loquentem⁴ vix consolarer,⁵ sentio quam difficile <sit> te absentem

¹ The Cons Suff in 150 was M Petr Mamertinus, the father, no doubt, of the Petr Mamertinus who married a daughter of Marcus, see Capit *Vit Comin* vii 5

² There are seventeen lines from here to the end of the letter

? 166 A D

FRONTO to Petronius Mamertinus, greeting

SARDIUS SATURNINUS has a son SARDIUS LUPUS, a learned and eloquent man, introduced to the Forum from my hearth and home, instructed by me in all the noble arts, a most assiduous hearer and a very great admirer of yours, nor the less

. . . with SARDIUS SATURNINUS,
 . . . you should count and love (as a member of)
 our (family)

? 166 A D

FRONTO to SARDIUS SATURNINUS, greeting

I have been unable to condole with you, while the wound was still fresh, in your most terrible affliction, being myself prostrated even up till now with a dangerous illness, at which very time, when I am worn out with the depression caused by many troubles, there has come the news of the loss of our young friend whom an unjust fate has torn away, from you the best of sons, from me the most delightful of housemates. Wherefore, though I am much better in health, yet sorrow cleaves to my heart and is intensified by the anguish of our LUPUS, who feels dreadfully the loss of the best of brothers. Since it would not be easy to console you, even if you were present and talking with me, I feel how

² Heindorf < *Quem* > *quom*.

³ Query *adl. quens te*.

⁴ For *Mai* = *consoler*

per litteras consolari Neque postulo ut maerere desinas—id enim frustra postulabo—sed ut moder-
<atius maereas>¹²

Ad Amicos, i 24 (Naber, p 188)

IUNIO MAXIMO Fronto salutem

Per Ulpium nostrum³ . . . , honestatis gravi-
tatisque tuae praedictorem, quem cupio ad me
celeriter remittas Neque enim cum alio ullo tanta
mihi familiaritas est aut tantus usus studiorum
bonarumque artium communicandi Multo etiam
mihi iucundior erit, quom sermone de te mutuo
recolemus ac recensebimus

Ad Amicos, i 25 (Naber, p 188)

FRONTO Squillae Gallicano⁴ salutem

Tibi, domine frater, commodius evenit qui pro
filio nostro praesens trepidaveris, quam mihi, qui tre-
pidaverim absens Nam tua trepidatio pro eventu
actionis facile sedata est, ego quoad mihi ab omni-
bus contubernalibus nuntiatum est, quo successu
noster orator egisset, trepidare non destiti Et tu
quidem ad singulos orationis successus, prout quaeque

¹ Alan

² Two pages are missing between this and what we have
of the next letter These contained three letters probably
like this one, letters of consolation, for the margin has
consolatoriae See Index (Naber, p 172, Ambr 337)
(1) Iunio Maximo, *Humanus casus hominis* (2) Praeclio
Pompeiano *Libris eius libra forti* (3) Sallio Saturnino
Hortulus semper constanter

³ From the Index (Naber, p. 172, Ambr 337)

⁴ Consul in 150

difficult it is to console you when absent by letter. And I do not ask you to cease grieving—for it would be useless to ask that—but to grieve with some moderation

? 166 A.D.

FRONTO to JUNIUS MAXIMUS, greeting.

By our friend Ulpus¹ (this) eulogizer of your probity and dignity, whom I desire you to send back to me speedily. For there is no one with whom I am on such intimate terms, or with whom I am wont so much to share my pursuits and love of the noble arts. He will be still more delightful to me when we exchange our mutual reminiscences and views of you

? 166 A.D.

FRONTO to SQUILLA GALLICANUS, greeting.

Yours has been a happier lot,² my lord brother, for you have felt nervous for your son on the spot, than mine, who have had to endure my nervousness at home. For your nervousness was easily allayed with the completion of the pleading, while I did not cease to be nervous until all my pupil housemates had brought me news of the success with which our orator had conducted the case. And you, indeed, at each separate triumph of the speech, as each

¹ Possibly the famous jurist Ulpus Marcellus, who was one of the *Consilium* of Marcus.

² Fronto writes to his friend Gallicanus on the success of his son at the bar. This son was evidently one of his pupils who lived in his house (*convubernatus*). The word *convubernus* had come to be used as a complimentary title with *filius* and *frater*.

THE CORRESPONDENCE OF

sententia laudem meruerat,¹ gaudio fruebire, at ego
domi sedens perpetua sollicitudine angebar, ut qui
periculum actoris recordarer, ludibus actionis non
interessem Tum præterea multiplices tu fructus
abstulisti. non enim audisti tantum sed et vidisti
agentem; nec eloquentia sola sed etiam vultu eius
et gestu lætatus es Ego tametsi quid dixerit scio,
tamen ignoro quemadmodum | dixerit. Postremo²
. . . . cui Callistus³ lacerimas patrem
adeptus es qui gaudeo et
. . . . hodie esse si hodie mens
. . . . in forum descendit natalibus nobilis, de foro
redit eloquentia quam genere nobilior⁴

¹ Heindorf for Cod. *meruerat*

² From here to the end of the letter are twenty six lines

³ This word is not certain

⁴ From the margin of the Codex After head of the letter
the margin has *mirè scripta epistola*.

Ambr 277

sentence evoked applause, were filled with joy, while I, sitting at home, was tortured with continuous anxiety, conscious as I was of the difficulties before the pleader, yet unable to share in the praises of his pleading. Then you carried away manifold advantages besides, for you not only heard, but also saw the performer and were delighted not by his eloquence only, but by his look and gesture. For me, though I know what he said, yet I do not know how he said it

.
He went down to the Forum noble by birth, he came back from it more noble by eloquence than by lineage

OTHER MISCELLANEOUS
REMAINS OF FRONTO

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OTHER MISCELLANEOUS REMAINS OF FRONTO

EX DIONE CASSIO, lxi. 18

Κορνήλιος Φρόντων ὁ τὰ πρῶτα τῶν τότε Ρωμαίων ἐν δίκαις φερόμενος, ἰστίρας ποτὲ βαθείας ἀπὸ δείπιου οἰκίδε ἐπαιῶν καὶ μαθῶι ταραΐ τιος, ᾧ συνηγορήσει ὑπέσχητο, δικάζειν αὐτόν, εἰ τε τῇ στολῇ τῇ δειπνιτιδί, ὥσπερ εἶχεν, ἐς τὸ δικαστήριον αὐτοῦ εἰσῆλθε καὶ ἦσ पासато, οὔτι γε τῷ ἔωθι ᾧ προσρήματι, τῷ "χαῖρε," ἄλλα τῷ ἑσπερινῷ τῷ "ὕγιαυε" χρησάμενος

EX EUMENII *Panegyrico Constantii*, 14

FRONTO, Romanae eloquentiae non secundum sed alterum decus, quom belli in Britannia confecti laudem Antonino principi duet, quamvis ille in ipso Urbis Palatio residens gerendi eius mandasset auspicium, veluti longae navis gubernaculis praesidentem totius velificationis et cursus gloriam meruisse testatus est

¹ The point in this story, such as it is seems to be that the court was still sitting in the early morning hours when Fronto came in from his banquet. It was a new day to the court, but the end of Fronto's day. Hence his use of the evening salutation. For the difference between χαῖρε, "Good

OTHER MISCELLANEOUS REMAINS OF FRONTO

FRONTO'S SALUTATION TO HADRIAN¹

? *About 136 A.D.*

CORNELIUS FRONTO, who held the first place at the bar among the Romans of that day, was returning home on one occasion very late in the evening from a banquet, and learning from one for whom he had promised to plead that Hadrian was sitting in court, he went in as he was in his banqueting dress to the court and saluted him, not with the morning salutation *χαίρε* but with the evening one *βγίατε*

FROM THE SPEECH ON THE WAR IN BRITAIN

140-1 A.D.

FRONTO, not the second but the alternative glory of Roman eloquence, when he was giving the emperor Antoninus² praise for the successful completion of the war in Britain,³ declared that although he had committed the conduct of the campaign to others, while sitting at home himself in the Palace at Rome, yet like the helmsman at the tiller of a ship of war, the glory of the whole navigation and voyage belonged to him

cheer ' (our "Good morning" or "How do you do") and *βγίατε*, "Vale" (our "Good night" or "Good bye") see Lucian *Pro Lapsu in Salutando*, 1, where a mistake in the use of these expressions is illustrated at length

¹ Pius ² 140 A.D.

OTHER MISCELLANEOUS

EX ANTEMIDORI *De Somniis*, iv. 24

Ὡς καὶ Φροῖτωι ὁ ἀρθριτικὸς θεραπείαν αἰτήσας ἰδοξεν ἐν τοῖς προαστείοις περιπατεῖν καὶ τερπολήσει χρησάμενος παρηγορήθη ἰκαίως ὥς ἴσον εἶναι τὸ χρέημα θεραπείᾳ.

EX AULI GELII *Noctibus Atticis*, xix. 8

An arena caelum triticum pluralia inveniantur atque inibi de quadrigis mimicitus nonnullis praeterea vocabulis, an singulari numero comperiantur

1 ADULESCENTULUS Romae priusquam Athenas concederem, quando erat a magistris auditionibusque obeundis otium, ad Frontonem Cornelium visendi gratia pergebam, sermonibusque eius purissimis bonarumque doctrinarum plenis fruebar. Nec unquam factum est, quoties eum vidimus loquentemque audivimus, quin rediremus cultiores doctioresque veluti fuit illa quodam die sermocinatio illius, levi quidem de re, sed a Latinae tamen linguae studio non abhorrens.

2 Nam quom quispiam familiaris eius, bene eruditus homo, et tum poeta illustris, liberatum se esse aquae intercutis morbo diceret, quod arenis calentibus esset usus, tum illudens Fronto

REMAINS OF FRONTO

FRONTO'S DREAM-CURE

? 140 A D

FRONTO, who suffered from rheumatism, having prayed for a cure, dreamt that he was walking in the suburbs of the city, and was not a little comforted by a close application of fire: so much was this so that the result was little short of a cure

THE PLURAL OF *arena*, *caelum*, ETC.

About 137 A D

Whether arena, caelum, triticum are found in the plural, and incidentally of quadrigae, inimicitiae, and some other nouns, whether they are met with in the singular number

1 WHEN I was a young man at Rome, before I migrated to Athens, and had a respite from attendance on masters and at lectures, I used to visit Cornelius Fronto for the pleasure of seeing him, and derived great advantage from his conversation, which was in the purest language and full of excellent information. And it was invariably the case that, as often as we saw him and heard his talk, we came away with our taste improved and our minds informed: as, for instance, was the case with that discussion by him on one occasion of a question trivial in itself indeed yet not unconnected with the study of the Latin language.

2 For when a certain close acquaintance of his, a man of learning and a distinguished poet of the time, told us that he had been cured of a dropsy by the application of heated "sands," Fronto, bantering him, said:

' Morbo quidem ' inquit "cires sed verbi vitio non cares. Quis enim Caesar ille perpetuus dictator, Cn Pompeii socer, a quo familia et appellatio Caesarum deinceps propagata est, vir ingenii prae cellentis, sermonis praeter alios suae aetatis castissimus, in libris quos ad M. Ciceronem *De Analogia* conscripsit, *arena* vitiose dici existimat quod *arena* numquam multitudinis numero appellanda sit, sicuti neque *caelum* neque *triticum*. Contra autem *quadrigas*, etiam si currus unus equorum quattuor iunctorum agmen unum sit, plurativo semper numero dicendas putat, sicut *arma* et *moenia* et *comitia* et *inimicitiae*—nunc quid contra ea dicis, poetarum pulcherrime, quo et te purges et non esse id vitium demonstres."

3 "De *caelo* inquit ille "et *tritico* non infitias eo, quin singulo semper numero dicenda sint, neque de *armis* et *moenibus* et *comitiis*, quin figura multitudinis perpetua censeantur. videbimus autem post de *inimicus* et *quadrigis*. Ac fortasse an de *quadrigis* veterum auctoritati concessero, *inimicitiam* tamen, sicut inscientiam et impotentiam et iniuriam, quae ratio est quam ob rem C. Caesar vel dictam esse a veteribus vel dicendam a nobis non putat? quando Plautus, linguae Latinae decus, *deliciam* quoque *εὐκῶς* dixerit pro *deliciis*.

Mea inquit voluptas, mea delicia

¹ *De Bello Parthico* ad fin.

² Verg. *Ecl.* v. 36, *Georg.* i. 317, uses *hordeum* (barley) in

‘ You are quit indeed of the disease, but of defect in diction you are not quit For Gaius Caesar, the father in law of Gnaeus Pompeius, he who was dictator for life, from whom the family and designation of the Caesars are derived and still continue, a man of pre eminent genius and distinguished beyond all his contemporaries for purity of style, in those books which he wrote to Cicero *On Analogy*,¹ holds that *arenæ* is a faulty locution, in that *arena* is never used in the plural any more than *cælum* or *tritum*,² but his opinion is that *quadrigæ* on the other hand, although a single chariot is a single team of horses yoked together, should always be spoken of in the plural number, just as *arma* and *moenia* and *comitia* and *inimicitiae* unless, my most brilliant of poets, you have anything to say to the contrary that shall clear you and prove that you were not in fault.”

3 “As to *cælum*, said the other, “and *tritum*, I do not deny that they should always be used in the singular number, nor as to *arma* and *moenia* and *comitia* that they should be regarded as invariably plural words about *inimicitiae* and *quadrigæ* however, we will consider later, and possibly as to the latter I shall bow to the authority of the ancients But what grounds has C. Caesar for supposing that *inimicitia* was not used by the ancients and cannot be used by us, just as much as *scientia* and *impotentia* and *iniuria*? since Plautus, the glory of the Latin tongue has used *delicia* also in the singular number for *deliciae*

*My darling, says he, my delight!*³

the plural and is taken to task by Ravinus a rival poet, who says let it as well say *tritica* (wheats)

¹ Plautus *Poen* 2. il. 152.

Inimicitiam autem Q. Ennius in illo memoratissimo libro dixit

*Ho inquit ingenio natus sum,
Amicitiam et inimicitiam in fronte prout iam gero*

Sed enim *arenas* parum Latine dici quis, oro te, alius aut scripsit aut dixit? Ac propterea peto ut, si C. Caesaris liber prae manibus est, promi iubeas, ut quam confidenter hoc dicat aestimari a te possit.

4 Tunc prolato libro *De Analogia* primo, verba haec ex eo prae memoriae mandavi. Nam quomodo supra dixisset neque *caelum liticum* neque *arenam multitudinis* significationem pati. *Auri tu inquit harum rerum natura accidere arbitraris, quod unam terram et plures terras, et urbem et urbes, et imperium et imperia dicamus, neque quadrigas in unam nominis figuram redigere, neque arenam in multitudinis appellationem convertere possimus?*

5 His deinde verbis lectis sibi, Fronto ad illum poetam

“Videturne tibi” inquit “C. Caesarem de statu verbi contra te satis aperte satisque constanter pronuntiasse?”

Tum permotus auctoritate libri poeta. “Si a Caesare inquit” ius provocandi foret, ego nunc ab hoc Caesaris libro provocarem. Sed quoniam ipse rationem sententiae suae reddere supersedit, nos te nunc rogamus ut dicas, quam esse causam viti putes et in *quadriga* dicenda et in *arenis*.”

Inimicitia Q Ennius has, in fact, used in that constantly quoted book of his

*With such a character did Nature me endow,
Friendship and enmity I bear upon my brow*¹

But indeed, I beseech you, who else has either written or said that *arenae* is bad Latin? And therefore I beg that, if Caesar's book be in your possession, you should bid it be brought, that you may judge how positively he says this

4 On the first book *On Analogy* being produced, I committed to memory these few words from it For after remarking that neither *caelum* nor *triticum* nor *arena* admits of a plural meaning, he² goes on, *Do you think that it results from the nature of these things, that we speak of one land and many lands, and of a city and cities, and of an empire and empires, but cannot reduce "quadrigae" to a noun of singular number nor convert "arena" into a term signifying plurality?*

5 After reading these words Fronto said to the poet

"Are you satisfied that C Caesar has decided against you clearly and firmly enough as to the status of the word?"

Then the poet, impressed by the authoritative nature of the book, said "If there were the right of appeal from Caesar, I would now appeal from this book of Caesar's But since he has himself omitted to give any reason for his verdict, I ask you now to tell us what fault you think there is in saying either *quadriga* or *arenae*

¹ Achilles is speaking Said also of Essex by Cliffe

² Caesar

Inimicitiam autem Q Ennius in illo memoratissimo libro dixit

Eo inquit ingenio natus sum,

Amicitiam et inimicitiam in fronte promptam gero

Sed enim *arenas* parum Latine dici quis, oro te, alius aut scripsit aut dixit? Ac propterea peto ut, si C Caesaris liber prae manibus est, promi iubeas, ut quam confidenter hoc dicat aestimari a te possit

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REMAINS OF FRONTO

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¹ Achilles is speaking. Said also of Essex by Cuffe

² Caesar

OTHER MISCELLANEOUS

6 Tum Fronto ita respondit •

“*Quadrigae* semper, etsi multiugae non sunt, multitudinis tamen tenentur numero, quoniam quattuor simul equi iuncti quadrigae, quasi quadriugae, vocantur. Neque debet prorsus appellatio equorum plurium includi in singularis numeri unitatem. Eadem quoque de *arena* rationem habendam, sed specie dispari, nam quomodo *arena* singulari numero dicta multitudinem tamen et copiam significet mirarum ex quibus constat partium, indocte et insci *arenae* dici videntur, tamquam id vocabulum indige numeri amplitudine, quomodo ei singulariter dici¹ et genita sit naturalis sui multitudo. Sed haec ego inquit “dixi non ut huius sententiae legisque fundi subscriptorque fierem, sed ut ne Caesaris, viri doctorum opinionem ἀπαρμύθητοι destituerem.

7 “Nam quomodo *caelum* semper αἰκῶς dicatur, *mare* et *terra* non semper, et *pulsis* et *ventus* et *fumus* non semper, cur *inducias* et *caerimonias* scriptores veterum nonnumquam singulari numero appellaverunt, *feri* et *nundinas* et *inferias* et *exsequias* numquam? *Cum* *mel* et *vinum* et id genus cetera multitudinis numerum capiunt, *lac* non capiat? Quaeri, inquam, ista omnia et enucleari et excudi ab hominibus negotiosis in civitate tam occupata non queunt. Quin h

¹ Read *dicto* with Madvig or after *dici* add <proprietus>

² Fronto himself used *arena* some few years later 143 A.D. see i p. 160. It is often used by Ovid, and also by Vergil Horace Seneca etc.

6 Then Fronto replied as follows :

"*Quadrage*, even though only one horse is yoked, always keeps the plural number, since four horses yoked together are called *quadrage*, as if it were *quadruage*, and certainly that which denotes several horses should not be compressed into the oneness of the singular number. The same reasoning applies also to *arena*, but from a different point of view, for since *arena*, though used in the singular number, yet signifies a plurality and abundance of tiny particles of which it is composed, *arenae* would seem to be used ignorantly and improperly, as though that term required an enlargement of number, though the conception of multitude essential to it is naturally expressed by the singular number. But I have said this," he added, "not as the ratifier and endorser of this verdict and rule,¹ but that I might not leave the opinion of Caesar, a learned man, without anyone to stand up for it.

7 "For while *caelum* is always spoken of in the singular, *mare* and *terra* not always, and *puls* and *ventus* and *fumus* not always, why have the old writers occasionally used *induciae* (a truce) and *caerimoniae* in the singular, but never *feriae* (holidays) and *nundinae* (market-day) and *inferiae* (sacrifice to the dead) and *exsequiae* (obseques)?² Why do *mel* and *vinum* and all other words of that kind admit of a plural, and *lac* not admit of one? All these things, I say, cannot be investigated and unravelled and hammered out by citizens so fully occupied in so busy a state. Nay, I see that I have kept

¹ So *funerals* in Old English. We use *obseques*, though Shakespeare has *obsequy*.

quoque ipsis, quae iam dixi, demoratus vos esse video, alicui opinor negotio destinatos. Itē ergo nunc et, quando forte erit otium, quaerite an *quadrigam* et *arenas* dixerit e cohorte illa dumtaxat antiquiore vel oratorum aliquis vel poetarum, id est classicus ad siduusque aliquis scriptor, non proletarius "

8 Haec quidem Fronto requirere nos iussit vocabula, non ea re opinor quod scripta esse in ullis veterum libris existimaret, sed ut nobis studium lecti tandi in quaerendis rarioribus verbis exerceret.

Quod unum ergo rarissimum videbatur invenimus, *quadrigam* numero singulari dictam, in libro *Saturarum* M. Varronis qui inscriptus est *Exdemetricus*. *Arenas* autem πληθυντικῶς dictas minore studio quaerimus, quia praeter C. Caesarem, quod equidem meminerim, nemo id doctorum hominum dedit ¹

EX AULI GELLII *Noctibus Atticis*, ii 26

Sermones M. Frontonis et Favorini philosophi de generibus colorum vocabulisque eorum Graecis et Latinis, atque inibi color spadix cuiusmodi sit

1 FAVORINUS philosophus quom ad Frontonem consularem pedibus aegrum visum iret, voluit me quoque ad eum secum ire. Ac deinde, quom ibi apud

¹ There is some confusion here. Caesar ruled *arenas* out. Pearce suggests <vitio> dedit or reluit.

you over time even by so much as I have already said, bound as you are I suppose on some business. Go then now, and when you chance to have the time, search whether some orator or poet, belonging at least to the more ancient school, that is, some writer of classic rank and of substance, and not of the common sort, have not used *quadriga* and *arenæ* "

8 Fronto bade us indeed look out for these words, not, I take it, because he thought they were to be found in any writings of the ancients, but that he might through the search after uncommon words pricise us in the habit of reading

The form, then which seemed the most uncommon of all we did find, *quadriga* spoken of in the singular, in the book of *Satures* by M Varro entitled *Exdemetricus* But for *arenæ* in the plural we looked with less care, because besides Caesar, as far as I remember, no man of learning has banned it

NAMES FOR THE COLOURS IN LATIN AND GREEK

After 143 A D

Conversation of M Fronto and Favorinus the philosopher on the different kinds of colours and the terms for them in Greek and Latin, and incidentally what sort of colour is spadix

1 WHEN FAVORINUS the philosopher was on his way to visit Fronto, formerly consul, who had gout, he wished me also to accompany him thither And then, when there, at Fronto's house, many

OTHER MISCELLANEOUS

2 Tum Fronto ad Favorinum

“Non infitias,” inquit, “imus quin lingua Graeca, quam tu videre legisse, prolixior fusiorque sit quam nostra sed in his tamen coloribus, quibus modo dixisti, designandis non perinde inopes sumus, ut tibi videmur Non enim haec sunt sola vocabula rufum colorem demonstrantia, quae tu modo dixisti, *rufus* et *ruber*, sed alia quoque habemus plura quam quae dicta abs te Graeca sunt *fulvus* enim et *flavus* et *rubidus* et *rutilus* et *luteus* et *spadix* appellationes sunt rufi coloris, aut acuentes eum quasi incendentes aut cum colore viridi miscentes aut nigro infuscantes aut virenti sensim albo illuminantes

3 “Nam phoeniceus, quem tu Graece φοινικα dixisti, noster est, et rutilus et spadix phoenicei σπινθιονος, qui factus Graece noster est, exuberantiam splendoremque significat ruboris, quales sunt fructus palmae arboris non admodum sole incocti, unde spadici et phoenicei nomen est *Spadica* enim Dorici vocant avulsum e palma termitem cum fructu

4 “*Fulvus* autem videtur, de rufo atque viridi mixtus, in aliis plus viridis, in aliis plus rufi habere sicut poeta, verborum diligentissimus, *fulcam* aquilam dicit et *iaspidem*, *fulvos* galeros et *fulvum* aurum et

2. Then Fronto said to Favorinus :

"We do not go as far as to deny that the Greek language, in which you seem to be well read, is more comprehensive and copious than our own still in designating those colours which you have just mentioned, we are not so poorly off as you seem to suppose. For, in fact, those words which you lately mentioned, *rufus* and *ruber*, are not our only ones to denote the colour red, but we have others besides and more than the Greek ones mentioned by you. For *fulvus* and *flavus* and *rubidus* and *phoeniceus* and *rutilus* and *luteus* and *spadix*¹ are designations of the colour red, either intensifying it, as if firing it, or blending it with green, or deepening it with black, or softly brightening it with greenish white.

3 "For *phoeniceus*, which you mentioned in its Greek form *φοινίξ*, is a word of our own, and *rutilus*, and *spadix*, which is synonymous with *phoeniceus*—a word that, though Greek by origin, is naturalized with us—signifies the richness and brilliance of red, such as it appears in the fruit of the palm tree when not very much burnt by the sun, and hence come the words *spadix* and *phoeniceus*. For the Dorians call a branch with fruit broken off from the palm-tree a *spadix*.

4 "*Fulvus*, however, seems to be a blend of red and green, in which sometimes the one colour, sometimes the other, predominates. As a poet, the most careful in his choice of words, calls an eagle *fulvus*, and jasper and wolfskin caps and gold, and sand

¹ These words represent the shades of red—tawny, auburn, brick red, purple red, golden red, orange red, date red.

OTHER MISCELLANEOUS

arenam fulvam et fulrum leonem; sicque Q Fnnius in *Annalibus aere fuko* dixit. *Flarus* contra videtur ex viridi et rufo et albo concretus: sic *flavescentes comae* et, quod mirari quosdam video, *frondes olearum* et Vergilio dicuntur *flatae*. Sic multo ante Pacuvius *aquam flavam* dixit et *flatum pulcerem*, cuius versus, quoniam sunt iucundissimi, libens commemini

*Cedo tamen pedem,¹ lymphis flavis flatum ut pulcerem
Manibus isdem, quibus Ulixi saepe permulsi, abluam,
Lassitudinemque minuam manuum mollitudine*

Rubidus autem est rufus atrior² et nigrore multo mixtus. *Luteus* contra rufus color est dilucidior unde eius quoque nomen esse factum videtur. Non ergo," inquit, "mi Favorine, species rufi coloris plures apud Graecos quam apud nos nominantur. Sed ne viridis quidem color pluribus ab illis, quam a nobis, vocabulis dicitur. Neque non potuit Vergilius, colorem equi significare viridem volens, caeruleum magis dicere equum quam glaucum. sed maluit verbo uti notiore Graeco quam inusitato Latino. Nostri autem Latini veteribus *caesia* dicta est, quae a Graecis γλαυκῶ-ις, ut Nigridius ait, de colore caeli quasi *caelia*."

6 Postquam haec Fronto dixit, tum Favorinus scientiam rerum uberem verborumque eius elegan-

¹ Some editors read *cedo tuum pedem mi* ² MSS. *atror*

¹ See Verg. *Aen.* xi 751; iv 261, vii 688, vii 279, xii 741, iv 159 (cp. Lucr. v 902) but he also says *flavi aurum* (i 592). Servius on the passage vii 688 mentions Fronto as speaking of *galei* etc.

² Verg. *Aen.* iv 590, cp. Hor. *Od.* i v 4

³ From the *Niptra*

and the lion all *fulvus*;¹ and so Quintus in his *Annales* used it of bronze. *Flavus*, on the other hand, seems to be a combination of green and red and white: thus tresses are called *flaventes*,² and, what I find surprising to some, Vergil speaks of the leaves of olives as *flavæ* and so, long before, Pacuvius³ talked of water⁴ and dust being *flavus*, and as his lines are most delightful, I willingly recall them:

*Reach me thy foot, that these same hands that bathe
Ulysses oft,*

*May with the yellow waters cleanse the yellow dust,
And with the hand's soft stroking soothe thy weariness*

Rubidus, however, is a darker red with a large proportion of black. *Luteus*, on the other hand, is a more transparent red, from which its name also seems to be derived⁵. So you see, my Favorinus that more shades of red have not distinctive names among the Greeks than among us. Nor have they more terms than we have for expressing the colour green either. Vergil, having occasion to describe a horse as green, could have used the word *caeruleus* rather than *glaucus*, but preferred to use a better known Greek word than an unusual Latin one⁶. Our ancient Latin writers called that *caesia*, which in Greek is γλαυκῶπις, as Nigidius⁷ says, from the colour of the sky, as if *caelia*.

5 When Fronto had said this, Favorinus, complimenting him warmly on his abundant knowledge of

¹ Vergil calls the Tiber *flavus* (*Aen.* vii. 31) and Horace

² The word seems to be taken from a weed *lutum*, which was rather yellow than red. It is used of the dawn by Verg. *Aen.* vii. 26.

³ i.e. *caeruleus* in the sense of green, for which see Propertius iv. ii. 43, Ovid, *Met.* xi. 158.

⁴ A Pythagorean philosopher and grammarian of Cicero's time.

OTHER MISCELLANEOUS

tiam exosculatus: "Absque te" inquit "uno forsitan lingua profecto Græci longe anteisset: sed tu, mi Fronto, quod in versu Homérico est, id facis:

καί νύ κεν ἡ παρέλασας ἡ ἀμφήριστοι ἔθκας

Sed quom omnia libens audiri, quæ peritissime dixisti, tum maxime, quod varietatem flavi coloris enarrasti, fecistisque, ut intelligerem verba illa ex annali quarto decimo Enni amoenissima quæ minime intelligebam.

*Verrunt extemplo placide¹ mare marmore flavo:
Caeruleum spumat mare conferta rate pulsum*

Non enim videbatur, caeruleum mare cum marmore flavo convenire Sed quom sit, ita ut dixisti, flavus color viridi et albo mixtus, pulcherrime prorsus spumas virentis maris *flavo marmore* appellavit."

EX AULI GELLII *Noctibus Atticis*, xiii 28

Quod Quadrigarius cum multis mortalibus dixit, an quid et quantum differret si dixisset cum multis hominibus

VERBA sunt Claudii Quadrigarii ex *Annalium* eius tertio decimo

Concione dimissa Metellus in Capitolium venit cum multis mortalibus inde quom domum proficisceretur tota civitas eum reduxit

¹ Editors read *placidum*

REMAINS OF FRONTO

facts and his felicity of expression, remarked, "But for you alone perhaps the Greek language would have come in first by a long way. But you, my Fronto, exemplify Homer's verse:

*Now had you passed me by in the race or made it a dead heat*¹

But while I listened with delight to all that you have so learnedly said, yet I was especially pleased with your analysis of the varieties of the colour *flavus*, and at your enabling me to understand those most charming lines from the fourteenth book of the *Annals* of Ennius, which I never understood:

*They sweep forth with the tranquil water's yellow flow;
Churned by the close-packed fleet the dark-blue ocean foams.*

For the 'dark-blue' sea did not seem to correspond with the 'yellow' flow. But since you have told us that the colour *flavus* is a blend of green and white, the foam of the green sea was assuredly most beautifully expressed by *flavo marmore*"

"MANY MEN" AND "MANY MORTALS"

After 143 A D

Inasmuch as Quadrigarius² uses the expression "with many mortals," what and how much difference it would make if he had said "with many men"

THE words from the thirteenth book of the *Annals* of Claudius Quadrigarius are:

The assembly being dismissed, Metellus came into the Capitol with many mortals: on his return home from there he was escorted by the whole city

¹ Hom. II. xxiii. 382

² A historian at the beginning of the first century B.C. who wrote a history of Rome from its capture by the Gauls

OTHER MISCELLANEOUS

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*They sneep forthnith the tranquil nater's yellow flow;
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OTHER MISCELLANEOUS

Quom is liber eaque verba M Frontoni, nobis et
 ic plerisque aliis adsistentibus, legerentur, et cuidam
 huius sine viro indocto videretur *nullis mortalibus* pro
 hominibus multis inepte frigideque in historia nimis
 que id poetice dixisse, tum Fronto illi, cui hoc vide
 batur

“Ain’ tu” inquit “aliarum homo rerum iudici
 elegantissimi *mortalibus nullis* ineptum tibi videri et
 frigidum? Nil autem arbitrare causae fuisse quod
 vir modestus et puri et prope cotidiani sermonis
mortalibus maluit quam *hominibus* dicere? Eandem
 que credis futuram fuisse multitudinis demonstra
 tionem, si *cum nullis hominibus* ac non *cum multis*
mortalibus diceret? Ego quidem sic existimo, nisi si
 me scriptoris istius omnisque antiquae orationis amor
 atque veneratio creco esse iudicio facit, longe lateque
 esse amplius prolixius fusiusque in significandi totius
 prope civitatis multitudine *mortales* quam *homines*
 dixisse. Nunquam multorum hominum appellatio in
 tra modicum quoque numerum cohiberi atque includi
 potest, multi autem mortales nescio quo pacto et
 quodam sensu enarrabili omne fere genus quod in
 civitate est et ordinum et aetatum et sexus compre
 hendunt. Quod scilicet Quadrigarius, ita ut res erat,
 ingentem et promiscuam multitudinem volens osten
 dere, cum multis mortalibus Metellum in Capitolium
 venisse dixit, *μᾶλλον* quam si cum multis
 hominibus dixisset.”

REMAINS OF LIRONTO

When that book and those words were read to Lironto, while I and many more were sitting with him, it was the opinion of a person present, and one by no means unlearned, that it was absurd and frigid in a historical work to say "with many mortals" instead of "with many men," and savoured too much of poetry. Then said Lironto to him who had expressed this view

"Do you, a man of the correctest taste in other things, affirm that you think 'many mortals' an absurd and frigid expression? And do you suppose that a man so discreet and master of so pure and current a style had no motive for preferring 'mortals' to 'men'?" And do you believe that it would have given the same convincing picture of a multitude of men if he had substituted *multis hominibus* for *multis mortalibus*? For my part, unless my love and reverence for that writer and for all the language of our old authors blinds my judgment, I hold that, in so describing the concourse of nearly a whole city, 'mortals' is an expression far and away more ample, more comprehensive, and more copious than simply 'men.' For the phrase *multi homines* can be contracted and compressed to mean quite a moderate number, while *multi mortales* in some mysterious way and by some subtle nuance includes almost the whole body of citizens of every class and age and sex. And surely Quadrigarius, wishing to describe what was actually the fact, the presence of a huge and mixed multitude, said that Metellus went into the Capitol 'with many mortals' more emphatically than if he had said 'with many men.'"

Ea nos omnia quae Fronto dixit quom ita, ut par
erit, non adprobantes tantum sed admirantes quoque
audiremus,

“Videte tamen” inquit “ne existimetis semper
atque omni loco mortales multos pro multis mor
talibus esse dicendum, ne plane sit Graecum illud
de Varronis *Satira* proverbium τὸ ἐν τῇ φακῇ μίρον’

Hoc iudicium Frontonis, etiam in parvis minu
tisque vocibus, non praetermittendum putavi, ne
nos forte fugeret lateretque subtilior huiusmodi
verborum consideratio

FR AULI GELLII *Noctibus Atticis*, xix 10

*Verba haec praeter propter in usu vulgari prodita etiam
Enni fuisse*

1 MEMINI me quondam et Celsinum Iulium Nu
midam ad Frontonem Cornelium, pedes tunc graviter
aegrum, ire visere Atque ibi qui introducti sumus
offendimus eum cubantem in scimpodio Graeciensi
circum undique sedentibus multis doctrina aut genere
aut fortuna nobilibus viris Adsistebant fabri aedium
complures balneis novis molendis adhibiti, ostende
bantque depictas in membranulis varias species bal
nearum Ex quibus quom elegisset unam formam

REMAINS OF FRONTO

When we were thus listening to all this that Fronto said, as was natural, not only with approbation but with admiration, he added :

"Take care, however, not to think that *multi mortales* should be used always and on every occasion for *multi homines*, that the Greek proverb from Varro's *Satire*, *myrrh-oil on a dish of lentils*, may not be actually exemplified."¹

This criticism of Fronto's, though concerned with trifling and unimportant locutions, I thought worthy to be recorded, that we should not fail, perchance, through neglect or inadvertence to apply a nice discrimination to words of this kind.

On praeter propter

That the expression praeter propter, which has come to be a vulgarism, is found in Ennius

After 143 A D

1. I REMEMBER that Julius Celsinus Numida and I once went to call on Cornelius Fronto who was at the time suffering from gout. When we were admitted, we found him lying on a pallet-bed of Grecian pattern with many persons eminent for learning, birth or fortune sitting round him. Several architects, called in for the construction of a new bath, were in attendance, and they were exhibiting various sketches of baths drawn upon little scrolls of parchment. When he had chosen one

¹ A proverb for "wasting a good thing", see also Cic. *Ad Att.* i. 10

ipsum de quo quaereretur scriptum esse, et a grammaticis contaminari magis solitum quam enarrari. Quocirca statim proferri *Iphigeniam* Q. Inni iubet. In eius tragoediae choro inscriptos esse hos versus legimus:

*Otio qui nescit uli, plus negotii
Habet quam quom est negotium in negotio¹
Nam cui quod agat institutum est, nullo negotio
In agit, id studet, ibi mentem atque animum delectat suum
Otioso in otio animus nescit quid velit
Hoc idem est, neque² domi nunc nos nec militiae sumus,
Imus huc, hinc illuc, quom illuc ventum³ est ire illinc libet,
Incerte errat animus, praeter propter vitam vivitur*

5 Hoc ubi lectum est, tum deinde Fronto ad grammaticum iam libantem

‘Audistine, inquit, “magister optime, Ennium tuum dixisse *praeter propter*, et cum sententia quidem tibi, quali severissimae philosophorum esse oburgationes solent? Petimus igitur dicas, quoniam de Enniano iam verbo quaeritur, qui sit notus huiusce versus sensus

Incerte errat animus, praeter propter vitam vivitur⁴

Et grammaticus sudans multum ac rubens multum, quom id plerique prolixius rideant, exsurgit, et abiens “Tibi, inquit, “Fronto, postea uni dicam, ne incitiores audiant et discant

Atque ita omnes relicta ibi quaestione verbi consurreximus

¹ Merry reads *negotiosod utitur negotio*

² Merry reads *idem <hic> est neque.*

that the meaning was as a rule rather tangled than unravelled by the grammarians. So he desired the *Iphigenia* of Q Ennius to be brought forthwith; and in a chorus of that tragedy we read these lines:

*He who can use not ease more labour has
Than when his labour in his labour lies,
For he who does what he has planned makes it
No labour, heart and mind delight therein:
In idle ease the heart knows not its wish
So we: at home we are not nor abroad,
Thus way we go, then that; no sooner come,
We wish to go elsen here, ne vacillate,
And live but there or thereabout our life.*

5 When this passage had been read, Fronto turning to the grammarian, who was now feeling uncomfortable, said:

"Do you hear, excellent master, that your friend Ennius has used *praeter propter*, and in a sentiment as dignified as the severest scolding by philosophers could be? We beg you, therefore, since we are enquiring about a word used by Ennius, to tell us what is held to be the meaning of this verse

Incerte errat animus, praeter propter vitam vitatur."

And the grammarian, sweating profusely and blushing profusely, as most of us were laughing heartily at his dilemma, got up and, as he went out, said, "I will give you an answer some time when you are alone, as I do not wish the more ignorant listeners to hear and profit by what I say."

After this we all rose up, leaving the discussion of the word there.

OTHER MISCELLANEOUS

Laberio ignobilia nimis et sordentia in usum linguae Latinae intromissa sunt¹

4 Tum Festus Postumius grammatico cuiusdam Latino, Frontoni familiari, "Docuit" inquit "nos Apollinaris *nanos* verbum Graecum esse, tu nos doce, in quo de mulis aut equuleis humilioribus volgo dicitur, anne Latinum sit, et apud quem scriptum reperiatur?"

5 Atqui ille grammaticus, homo sane perquam in noscendis veteribus scriptis exercitus, "Si piaculum" inquit "non committitur, praesente Apollinari, quid de voce ulla Graeca Latinae sentiam dicere, audeo tibi, Feste, quaerenti respondere, esse hoc verbum Latinum, scriptumque inveniri in poematis Helvii Cinnae, non ignobilis neque indocti poetae"; verusque eius ipsos dixit quos, quoniam memoriae mihi forte aderant, adscripsi

*At nunc me Cenumana per salicta
Binis rheda rapit citata nanis*

GRATIARUM ACTIO IN SENATU PRO CARTHAGINENSIBUS¹

.....

Sicut Rhodum condidisti Ceteros omnium popu

¹ Found by Mai in a palimpsest (*Cod. Palat. xxiv. ff. 53 and 46*). Only the last 400 or so letters from the end of the speech are consecutively decipherable out of about 2 600. The scattered words legible from the rest of the speech contained a reference to the Carthaginian sea power and

REMAINS OF FRONTO

the much too mean and vulgar expressions brought by Laberius into use in Latin "

4 Then Postumius Festus, turning to a Latin grammarian, a friend of Fronto's, said, "Apollinaris has told us that *nani* is a Greek word Will you inform us whether, as commonly used of mules and small horses, it is a Latin word, and in what author it is found?"

5 And the grammarian, a man without a doubt exceptionally versed in the writings of the ancients, said, "If I am not guilty of criminal presumption in saying, with Apollinaris present, what I think of any Greek or Latin word, I venture, Festus, in answer to your question to say that this word is Latin and is found written in the poems of Helvius Cinna,¹ no mean or unlearned poet, and he recited his actual verses, which, as they happened to stick in my memory, I have added

*Now swiftly past Cisalpine willow-thickets
My phucon and pair of jennets whirled me*

SPEECH OF THANKS IN THE SENATE ON BEHALF OF THE
CARTHAGINIANS ADDRESS TO ANTONINUS PIUS

About 153 A D

.....

Just as you rebuilt Rhodes Whatever Gods there

¹ The poet slain by mistake for the conspirator Cinna at the murder of Caesar

empire, to *seditionis orbi*, to a shrine and possibly, as Mai thinks, to the elder Faustina. The dots in the last lines represent the actual letters lost.

lorum atque omnium urbium deos precor quæsoque ut salutem tuam, qua imperium populi Romani nostrique salus et provinciarum et omnium gentium ac nationum libertas dignitas securitas nititur, in longa tempora protegant et diuturnius te salvom sistant, atque urbes ita ut incolumes sint in . . . imum . . . restituas . . . atque præcipuas virtutes conservent <ut> Latini nominis . . . ornamentum . . . causa tem . . . nostrarum variarum fortunarum subsidium

Ex OCTAVIO MINUCHII FELICIS, ix. 8

Et de convivio notum est passim omnes loquuntur: id etiam Cirtensis nostri¹ testatur oratio.—

“Ad epulas solenni die coeunt cum omnibus liberis sororibus matribus sexus omnis homines et omnis ætatis Illic post multas epulas, ubi convivium caluit² et incestæ libidinis, ebrietatis³ fervor exarsit, canis qui candelabro nexus est, iactu offulæ ultra spatium lineæ, qua vinctus est, ad impetum et saltum provocatur: sic everso et extincto conscio lumine impudentibus tenebris nexus infandæ cupiditatis involvunt per incertum sortis, et si non

¹ *cp Min. Fel xxxi 1* Sic de isto (convivio) et tuus Fronto non ut affirmator testimonium fecit sed convicium ut orator aspersit

² Or *incaluit* Naber reads *coaluit*

³ Hildebrand would read *ebriolatus*

¹ Nothing more is known of this speech or the attitude of Fronto towards the Christians. Some of these were put to death under Lollius Urbicus, the *præf. urbi* at Rome in 152, and again under Rusticus in 163. Had Fronto gone to Asia

REMAINS OF FRONTO

be of all peoples and of all cities I pray and beseech to guard for long years to come your health, on which is based the empire of the Roman People and our safety and the liberty, dignity, and security of the provinces and of all races and nations, and to keep you safe far into the future, and the cities so that they be unharmed . . . may you restore . . . and may they keep their conspicuous virtues (to be) . . . an ornament of the Latin name . . . the mainstay of our changing fortunes

THE "INCESTUOUS BANQUETS" OF THE CHRISTIANS

AND about their banquet the facts are known they are common talk everywhere the speech¹ of our fellow citizen from Circa also bears witness to them —

"On a regular day they come together for a feast with all their children and sisters and mothers, persons of both sexes and of every age. Then after much feasting, when the banquet has waxed hot and the passion of impure lust and drunkenness has been kindled in the company, a dog which has been tied to the standing lamp is incited to jump and bound up by a little cake thrown to it beyond its tether. The tell tale light being by this means cast down and extinguished, the guests under cover of the shameless darkness embrace one another in their unspeakable concupiscence, as chance brings

as proconsul in 154 (see i p. 237) he would have had to deal with the incident of Polycarp's martyrdom. The accusation of *Θυσια δαιμονια* against the Christians was common: see Tert. *Apol.* vii, Justin, *Apol.* i 26, etc.

OTHER MISCELLANEOUS

omnes opera, conscientia tamen priter incesti, quoniam voto universorum adpetitur quidquid incidere potest in actu singulorum "1

EX M. ANTONINI LIBRO *Pro Rebus Suis*, i. 11

Παρὰ Φρόντωνος τὸ ἐπιστῆσαι, οἷα ἡ τираνικὴ βασκανία καὶ ποικιλία καὶ ὑπόκρισις καὶ ὅτι ὡς ἐπίταν οἱ καλούμενοι οὗτοι παρ' ἡμῶν Εὐπατρίδαι ἀστοργότεροί πως εἰσίν

n Min Felix
' Thieste in
ar in style to

this extract, and probably came from the same source. Another quotation from Fronto's speech against the Christians may be possibly found in a sentence *Ex is dori Originibus*, xi. 2, 46 (*De ea cere a coercendo dicto*) *Ist pergruacari potius amoris locis quam coerceri videretur*. The words certainly read like Fronto's.

REMAINS OF FRONTO

them together, and, if not in fact yet in guilt, all are alike incestuous, since whatever can result by the act of individuals is potentially desired by the wish of all "

WHAT MARCUS LEARNT FROM FRONTO

About 176 A.D.

From Fronto ¹ to note the envy, the subtlety, and the dissimulation which are habitual to a tyrant; and that, as a general rule, those amongst us who rank as Patricians are somewhat wanting in natural affection ²

¹ He learnt other and even better things from him, see

¹ p. 17

² See *Ad Verum*, ii 7, and *Just. Instit.* ii 18 fr.

MISCELLANEOUS LETTERS OF
MARCUS AURELIUS

INTRODUCTION

MARCUS AS LETTER-WRITER

PERHAPS the more interesting part of the Fronto correspondence is that which contains the letters of Marcus and Pius. But we cannot fairly judge of their epistolary style from these alone. Philostratus says¹ that "in his opinion the best letter writers for style were of kings the deified Marcus in the letters he wrote himself, for the firmness (τὸ ἰδραῖον) of his character was reflected in his writing by his choice of language, and of orators Herodes the Athenian, though by his over atticism and prolixity² he often oversteps the bounds proper to the epistolary style."

Marcus was a prolific letter writer. According to Capitolinus³ he defended himself against calumny by letters. To his friends he sometimes, as we see below, wrote three times in one day. On one occasion he tells us that he had dictated thirty letters,⁴ but these were probably official correspondence. Nearly 200 of his imperial rescripts are extant, which though interesting would be out of place here. Many are in

¹ *Epistles*, p. 364 Kayser

² We have only one letter of his and it certainly is not prolix for it consists of but one word, *ἐμνήης*, addressed to Avidius Cassius when he revolted

³ *Vit. Mar.* xxii 6, xxix. 5, cp xxiii 7, 9

⁴ See i p. 185

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the form of letters¹ They contain characteristic sayings such as "No one has a right to let his own negligence prejudice others";² "Let those who have charge of our interests know that the cause of liberty is to be set before any pecuniary advantage to ourselves";³ "It would not be consistent with humanity to delay the enfranchisement of a slave for the sake of pecuniary gain";⁴ "It would seem beyond measure unfair that a husband should insist upon a chastity from his wife which he does not practise himself";⁵ "Nothing must be done contrary to local custom"

In answer to Ulpian Eurycles,⁶ *curator* of Ephesus, asking what should be done with old decayed statues of preceding emperors in the Ephesian senate house, we find the interesting pronouncement, "There must be no re-working of the material into likenesses of us For as we are not in other respects solicitous of honours for ourselves, much less should we permit those of others to be transferred to us As many of the statues as are in good preservation should be kept under their original names, but with respect to those that are too battered to be identified, perhaps their titles can be recovered from inscriptions on their bases or from records that may exist in the possession of the Council, so that our progenitors may rather receive a renewal of their honour than

¹ e.g. those which are addressed to "My dearest Piso" "My dearest Saxe," etc. *Digest*, xlviii 18, 1, § 27; ibid. xxix 5, 3, etc.

² *Digest*, ii 15 3 ³ *Just Inst* iii 11

⁴ *Digest*, xl 5, 37

⁵ Augustine, *de Adult* ii 8.

⁶ An inscription found at Ephesus dated 164 A.D. See *Oesterl. ArchÄol Institut* 1913, ii 121 *Dittenb* 508, *Enc Eph* ii 131

INTRODUCTION

its extinction through the melting down of their images."

There are, besides, two or three inscriptions and one papyrus, all much mutilated,¹ recording letters or rescripts of Marcus one in 163 to Pontius Laelianus, consul of that year. It contains a rare word γλωσσόκομον, rejected by Phrynichus²

Besides the above there are extant only two letters or parts of letters that are certainly genuine. Following these are two letters from Christian sources, the letter to Euxenianus Publico with respect to Abercius, bishop of Hieropolis, and the letter to the Senate purporting to give a report of the "Miraculous Victory" over the Quadi. The fact of the victory with the unexpected salvation of the Roman army is certain, but the heathen writers attribute it to the prayers of the emperor or the incantations of an Egyptian *magus*.

After these two letters come ten short epistles, or parts of such, which would be of considerable interest if their authenticity were established. Till comparatively lately they were accepted unquestioningly, and afforded material for charges against Marcus. They are all found in the *Scriptores Historiae Augustae*, a late compilation of the fourth Century, intended as a supplement to Suetonius's *Lives of the Caesars*, and attributed to various authors.

But in spite of Renan and Waddington and Naber and others, who have quoted them as evidence, they cannot be regarded as genuine. They contain several

¹ Boeckh *Inscr. Graec.* i. 1319, Kaibel *ibid.* iii. 39a, iv. 363 v. 446. *Aegypt. Urkunden* i. 74, *Griech. Urkunden* (Fayum) i. 74.

² Kaibel, *Griech. Inscr.* iv. 1534, Phrynichus 93, AB 32.

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later words, and their style is rhetorical and unworthy of the subjects treated. The puerile playing upon words, *Avidius* . . . *avidus*, etc betrays their artificial character. Writing of Cassius, the general who conducted the Parthian war to a successful conclusion and afterwards in 175 rebelled against Marcus, the latter is represented as quoting γνῶμαι from Suetonius instead of giving his own opinions. Moreover facts mentioned in the letters are at variance with what is known from other sources. For instance, Marcus was not in or near Rome in 175, as required by the Faustina correspondence; nor was Pompeianus, his son law, consul in 176, nor was Lucius ever spoken of as grandson of Pius, but always as his son and the brother of Marcus, nor could Fadilla in 175 be alluded to as *puella virgo*, for by that time she would have been twenty five and almost certainly married.

It is also incredible that Avidius Cassius should have contemplated revolt, and so openly as to arouse definite suspicions in the mind of Verus, so long before the actual outbreak. We know from Fronto's letters¹ that Verus and Cassius were on excellent terms as late as 165, and Fronto's own letter² to him shows the estimation in which he was then held. When Cassius revolted, Marcus felt it deeply as the defection of a friend³. I equally rhetorical and fictitious is a letter said to be from Cassius to his son in law⁴. "Marcus is assuredly an excellent man, but while he covets a reputation for clemency, he lets those live whose lives he does not approve. Where is Lucius Cassius, whose name I bear in vain?"

¹ *Ad Verum*, 3.

² *Ad Amicum*, 16.

³ *Ad Frontem*, 24.

⁴ *Ad Lucium*, 20. *Ad Lucium*, 20.

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Where the great Marcus Cato the Censor? Where all the discipline of our ancestors? Marcus Antoninus philosophizes and enquires about first principles and about the soul and about what is honourable and just, and has no thought for the State¹ You have heard of the *praefectus praetorio*² of our philosopher, who was a beggarly pauper three days before he was appointed, but has suddenly become rich—whence, pray, if not from the vitals of the State and the property of the provincials?³ Well, let them be rich, let them be opulent they will serve to fill the public treasury" By a commonplace of the rhetorical schools Cassius in another passage is made to liken himself to Catiline and Marcus to the *dialogista* (Cicero)⁴

However there are some touches in the correspondence which are true to character, such as the words attributed to Lucius, "I do not hate the man," which are in keeping with his well-known *bonitas*, and the "Perish my children" of Marcus, which he might well have said. But he is not likely to have quoted Suetonius or Horace, to the latter of whom he took a dislike⁵ in his younger days. The fabricator of the letters was perhaps Aemilius Parthenianus, a writer of the third or fourth century.

¹ Contrary to fact, see Herodian, i 4, § 2, and Dio, quoted above

² Bassaeus Rufus is meant. He was *praef praet* 168-177

³ But see Dio lxxi 3-3

⁴ For the whole question of the authenticity of these letters see Civalina, *De Falsularum quae a scriptoribus saeculi riae Augustae proferuntur fide*.

⁵ See i p 133.

INTRODUCTION

later words, and their style is rhetorical and unworthy of the subjects treated. The puerile playing upon words, *Audius* . . . *audus*, etc betrays their artificial character. Writing of Cassius, the general who conducted the Parthian war to a successful conclusion and afterwards in 175 rebelled against Marcus, the latter is represented as quoting γνῶμαι from Suetonius instead of giving his own opinions. Moreover facts mentioned in the letters are at variance with what is known from other sources. For instance, Marcus was not in or near Rome in 175, as required by the Faustina correspondence; nor was Pompeianus, his son law, consul in 176, nor was Lucius ever spoken of as grandson of Pius, but always as his son and the brother of Marcus, nor could Fadilla in 175 be alluded to as *puella virgo*, for by that time she would have been twenty five and almost certainly married.

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¹ *Ad Ier* ii 3.

² *Ad Aricos*, i. 6.

³ Dio, lxxi 24.

⁴ Vulgatus Gallicanus, *Vol. Avid Cass* 14.

INTRODUCTION

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⁴ For the whole question of the authenticity of these letters see Czwalina, *De Epistularum quae a aristoteli historiae Augustae proferuntur fide*.

⁵ See i p. 133.

MISCELLANEOUS LETTERS OF MARCUS AURELIUS

BOECKH, *Inscr. Graec.* 3176

Μάρκος Αὐρήλιος Καῖσαρ αὐτοκράτορος Καίσαρος
Τίτου Αἰλίου Ἀδριανοῦ Ἀντωνεῖνου Σεβαστοῦ πατὺρ
πατρίδος υἱός, δημαρχικῆς ἐξουσίας, ὑπατος τὸ β, συνό-
δῳ τῷ περὶ τὸν Βρισέα Διώνισον χαίρειν

Εὐνοια ὑμῶν ἦν ἐι δεῖξασθε συνησθέντες μοι γεννηθέντος
υἱοῦ, εἰ καὶ ἐτέρως τοῦτο ἀπέβη, οὐδὲν ἥτιον φανερὰ
ἐγένετο.

Τὸ ψήφισμα ἐπέγραψεν Τ. Ἀτείλιος Μάξιμος ὁ κρά-
τιστος αἰθίπατος καὶ φίλος ἡμῶν.

Ἐρρῶσθαι ὑμῶς βούλομαι. Πρὸ ε Καλ. Ἀπριλ. ἀπὸ
Λαρίου.

Τὴν ἐπιγραφὴν ποιήσαντος Μ. Ἀντωνίου Ἀρτεμᾶ,
δωρεὰν ταμειῶντος Σοιλπικίου Ρουφείνου.

EX PHILOSTRATI *Vitis Sophistarum*, p. 242 (KAYSER)

Μετὰ τὰ ἐν τῇ Παννωίᾳ διητᾶτο μὲν ὁ Ἡρώδης ἐν τῇ
Ἀττικῇ περὶ τοῖς φιλτάτοις ἐαυτῷ δῆμους Μαραθῶνα καὶ

¹ This inscription is on a stone found at Athens, according
to Pausanias (ii. 32. 1), who mentions it as being in the
Academy. It is now in the British Museum. The inscription
in the *Academy* of Herodes at Olympia; see Dessau, ii. 5503.

MISCELLANEOUS LETTERS OF MARCUS AURELIUS

MARCUS TO THE GUILD OF DIONYSIUS BRISEUS AT
SMYRNA¹

March 28, 147 A.D.

MARCUS AURELIUS CAESAR, son of the Emperor Caesar Titus Aelius Adrianus Augustus, Father of his country, invested with Tribunitian Power, Consul for the second time, to the Synod of the Guild of Dionysus Briseus, greeting:

Your good will which you shewed in congratulating me on the birth of a son,² even though the issue belied our hopes, was none the less manifest.

T Atilius Maximus, the most honourable proconsul and our friend, inscribed the decree

I wish you farewell. from Lorum, the 28th March.

The inscription was made by M Antonius Artemas, Sulpicius Rufinus being honorary treasurer

MARCUS AND HERODES ATTICUS

176 A.D.

AFTER the events in Pannonia³ Herodes lived in Attica in his favourite demes of Marathon and

There is a difficulty about the birth of this son, as *Capit Vit Marci*, vi 6, says that Marcus received the *Trib Pot* on the birth of a daughter, and yet we know he received it in 147. The daughter was born in 146

³ For these see *Marcus Antoninus* in the Loeb series, pp 366 ff.

MISCELLANEOUS LETTERS OF

Κηφισίαι, ἐξηρημέητης αἰτοῦ τῆς παιταχόθεν ιεόγητος, οἱ κατ' ἔρωτα τῶν δεικίου λόγων ἐφοίτων Ἀθήναιζε.

Πεῖραι δὲ τοιοῦμαιος, μὴ χαλε-ὸς αὐτῷ εἴη διὰ τὰ ἐν τῷ δικαστηρίῳ, τίμπει πρὸς αὐτὸν ἐπιστολὴν οὐκ ἀ-ο λογίαι ἔχουσαι ἀλλ' ἐγκλημα, "θαιμάζειν" γάρ, ἔφη, "τοῦ χύριν οἰκίτι αὐτῷ ἐπιστέλλοι καίτοι τοῖ πρὸ τοῦ χροίοι θαμὰ οὔτω γράφων, ὡς καὶ τρεῖς γραμματοφόροις ἀφικέσθαι τυτὲ παρ' αὐτοῖ ἐι ἡμέρη μιᾷ κατὰ τόδας ἀλλήλων."

Καὶ ὁ αὐτοκράτωρ διὰ πλειόων μὲν καὶ ὑ-ἐρ πλειόνων, θαυμάσιον δὲ ἦθος ἐγκατάμιξας τοῖς γράμμασι, ἐτίστειλε πρὸς τὸν Ἡρώδῃ, ὧν ἐγὼ τὰ ξυντείοντα ἐς τὸν παρόντα μοι λόγον ἐξελὰν τῆς ἐπιστολῆς δηλώσω τὸ μὲν δὴ προσίμιον τῶν ἐπισταλμέων "Χαῖρέ μοι, φίλε Ἡρώδη" διαλεχθεῖς δὲ ὑπὲρ τῶν τοῦ πολέμου χειμαδίων, ἐν οἷς ἦν τότε, καὶ τὴν γυιαῖκα ὀλοφιράμενος ἄρτι αὐτῷ τεθνεῶσαν, εἰπὼν τέ τι καὶ περὶ τῆς τοῦ σώματος ἀσθενείας ἐφεξῆς γράφει, "Σοὶ δὲ ὑγιαίνειν τε εὐχομαι καὶ περὶ ἐμοῦ ὡς εὖνου σοι διανοεῖσθαι, μηδὲ ἡγεῖσθαι ἀδικεῖσθαι, εἰ κατα-φωράσας τινος τῶν σῶν πλημμελοῦντας κολάσει ἐπ αὐτοὺς ἐχρησάμην ὡς οἶόν τε ἐπιεικεῖ. διὰ μὲν δὴ ταῦτα μὴ ὀργίζου, εἰ δέ τι λελύπηκά σε ἢ λυπῶ, ἀταίτησον παρ' ἐμοῦ δίκας ἐν τῷ ἱερῷ τῆς ἐν ἄστει Ἀθηνᾶς ἐι μυστηρίοις.

¹ See Aul Gellius i. 2, xviii 10.

Cephisia,¹ attended by young men from every quarter, who travelled to Athens from a desire to hear his oratory

Wishing to make trial whether Marcus was angry with him owing to what had occurred at the trial,² he sent him a letter not containing excuses but a complaint, for he said that "he wondered for what reason Marcus no longer wrote to him, though in times past he wrote so often that on one occasion three letter carriers reached him on a single day, one treading on the heels of another

And the Emperor at greater length and on greater subjects, and putting a wonderful amount of character into the letter, sent in answer to Herodes, from which I will extract what bears upon my present subject and quote it. The letter opened with the words "Hail, my dear Herodes", and after speaking of his winter quarters after the war, in which he was at the time, and lamenting the wife whom he had lately lost,³ and saying something also about his bodily weakness, he went on as follows. "But for you I pray that you may have good health, and may think of me as your well wisher and not consider yourself wronged because, detecting some of your household in wrong doings, I punished them in the mildest way possible. Be not angry with me on this account, but, if I have done you, or am doing you, any injury, ask satisfaction of me in the temple of Athena in the City⁴ during the Mysteries. For I

¹ See reference in note 3 p. 295

² At Halicarnassus in Asia Minor, during the winter of 175-6

⁴ At Athens.

εἰσεβῆ οὕτω τὰ τῶν Χριστιανῶν, ὡς δαιμονωντάς τε ἰᾶσθαι καὶ ἰόσους ἄλλας εὐκολώτατα θεραπεύειν, τοῦτον κατὰ τὸ ἀναγκαῖον ἡμεῖς χρήζοντες, Οὐαλέριον καὶ Βασσιανὸν μαγιστριανοὺς τῶν θείων ἡμῶν ὀφφικίων ἐπέμψαμεν τὸν ἄνδρα μετ' αἰδοῦς καὶ τιμῆς ἀπάσης ὡς ἡμᾶς ἀγαγεῖν. κελεύομεν οὖν τῇ σῇ στερρότητι πείσαι τὸν ἄνδρα σὺν προθυμίᾳ πάσῃ πρὸς ἡμᾶς ἀφικέσθαι, εὖ εἰδότε ὡς οὐ μέτριός σοι κείσεται παρ' ἡμῖν καὶ ὑπὲρ τούτου ὁ ἔπαινος ἔρρωσο.

Μάρκου Βασιλέως ἐπιστολὴ πρὸς τὴν σύγκλητον, ἐν ᾗ μαρτυρεῖ Χριστιανοὺς αἰτίους γεγενῆσθαι τῆς νίκης αὐτῶν.

1. Αἰτοκρίτωρ Καῖσαρ Μάρκος Αὐρήλιος Ἀντωνῖος Γερμανικὸς Παρθικὸς Σαρματικὸς δῆμῳ Ῥωμαίων καὶ τῇ ἱερᾷ συγκλήτῳ χαίρειν

Φανερὰ ὑμῖν ἐποίησα τὰ τοῦ ἐμοῦ σκοποῦ μεγέθη, ὅποια ἐν τῇ Γερμανίᾳ ἐκ περιστάσεως διὰ περιβολῆς ἐπακολουθήματα ἐποίησα ἐν τῇ μεθορίᾳ καμῶν καὶ παθῶν,¹ ἐν

¹ Sylburg has suggested that these words should be Κουάδων καὶ Σαρματῶν. The MSS. have σπαθῶν.

¹ Marcus in his *Thoughts* professes disbelief in exorcism (i. 6). This is only one proof out of many that this letter is a Christian forgery. Christian tradition was strongly in favour of Marcus. Baropius early in the seventeenth century had in his possession a letter purporting to be from Aborcus to

The
in 174.

175.
held.

MARCUS AURELIUS

man of such sanctity among the Christians as both to cure those who are possessed by demons¹ and easily heal all other diseases. Having imperative need of him we have sent Valerius and Bissianus representatives of our officials for sacred things, to bring the man to us with all reverence and honour. Accordingly we bid you with your usual firmness to persuade him to come to us with all speed, and you know that this, too, will gain for you no little praise from us. Firewell.

THE LETTER² OF THE EMPEROR MARCUS TO THE SENATE IN WHICH HE TESTIFIES THAT THE CHRISTIANS WERE THE CAUSE OF THE VICTORY OF THE ROMANS

? 174 A.D.

1 THE Emperor Caesar Marcus Aurelius Antoninus Germanicus Parthicus Sarmaticus³ to the People of the Romans and the Sacred Senate, greeting:

I made known⁴ to you the greatness of my enterprise, and what things I did in Germany after the critical occasion of my being hemmed in on the frontier, in dire distress and suffering, when I was

¹ Though this letter is certainly spurious yet there must have been a report to the senate by Marcus on the remarkable victory gained over the Quadi, of which both Christian and heathen writers make mention. The latter attributed the victory to the prayers or merits of the emperor, the Christians to the intercessions of the soldiers of their religion in the *Legio fulminata*, called from their success *fulminatrix*. It is curious, however, that this legion (twelfth) is not mentioned here. The commander was probably Pertinax (see *Chronicon Pascale*), not Pompeianus, the son in law of Marcus. The word *σπαχοντες* (serpents, i.e. standards of cohorts) is also used by Lucian *Quom. Hist.* 29. It here stands for the name of the barbarian regiments or divisions (Drungi). For the victory see Claudian *De tert. Consulatu* 93.

εὐχέσθαι θεῷ, ὃ ἐγὼ ἡγιόοιν, εἰθίως ὑδωρ ἡκολοίθαι οἶραιύθει, ἐπὶ μὲν ἡμᾶς ψυχρότατον, ἐπὶ δὲ τοὺς Ῥωμαίων ἐπιβουλους χάλαζα τιρώδης ἀλλὰ καὶ εἰθὺ θεοῦ ταραοισίαν ἐν εὐχῇ γινομένην ταραντικά ὡς ἀνυπερβλήτου καὶ ἀκαταλύτου¹

4. Αὐτόθεν οὖν ἀρξάμενοι συγχωρήσωμεν τοῖς τοιοῦτοις εἶναι Χριστιανοῖς, ἵνα μὴ καθ' ἡμῶν τι τοιοῦτοι αἰτησάμενοι ὄπλον ἐπιτύχωσι τὸν δὲ τοιοῦτον σιμβολεῖω, διὰ τὸ τοιοῦτον εἶναι, Χριστιανὸν μὴ ἐγκαλεῖσθαι. εἰ δὲ εὐρεθείη τις ἐγκαλῶν τῷ Χριστιανῷ ὅτι Χριστιανός ἐστι, τὸν μὲν προσαγόμεον Χριστιανὸν πρόδηλον εἶναι βούλομαι .² γίνεσθαι ὁμολογήσαντα τοῦτο, ἀλλὰ ἕτερον μηδὲν ἐγκαλούμενον ἢ ὅτι Χριστιανός ἐστι μόνον, τὸν προσάγοντα δὲ τοῦτον ζῶντα καίεσθαι τὸν δὲ Χριστιανὸν ὁμολογήσαντα καὶ στυγασφασιάμενον περὶ τοῦ τοιοῦτου τὸν πεπιστευμένον τὴν ἐπαρχίαν εἰς μετάνοιαν καὶ ἀνελευθερίαν τὸν τοιοῦτον μὴ μετάνοιαν.

5 Ταῦτα δὲ καὶ τῆς συγκλήτου δόγματι κυρωθῆναι βούλομαι, καὶ κελεύω τοῦτό μου τὸ διάταγμα ἐν τῷ Φόρῳ τοῦ Τραϊανοῦ προτεθῆναι πρὸς τὸ δύνασθαι ἀναγινώσκεσθαι φροντίσει ὁ πραΐφεκτος Βιτράσιος Πολλίων εἰς τὰς πέριξ ἐπαρχίας πεμφθῆναι πάντα δὲ τὸν βουλόμενον χρῆσθαι καὶ ἔχειν μὴ κωλύεσθαι λαμβάνειν ἐκ τῶν προτεθέντων παρ' ἡμῶν.

¹ A verb is wanted such as κατεῖδομεν, which might perhaps be read for καὶ εὐθύ

² Some participle meaning "acquitted" must have dropped out.

MARCUS AURELIUS

whom I knew not, straightway there came water from heaven, the coolest of rain upon us, but upon the enemies of Rome fiery hail. So straightway was revealed to us at once, as they prayed, the presence of their God, as of one omnipotent and everlasting.

4 From this moment, therefore, let us allow such persons to be Christians, lest by prying they obtain such weapons against us. And I propose that no such person be accused on the ground of his being a Christian. But, if anyone be found accusing the Christian for being a Christian, I wish it to be made clear that the Christian who is brought to trial should be (acquitted), if he confesses himself to be a Christian, and *no other charge is brought against him* except that he is a Christian, but that his accuser shall be burnt alive,¹ and the Governor who is set over the province must not force to recant or deprive of his liberty the Christian who confesses that he is one, and is credited.

5 My will is that this should be ratified by a decree of the Senate, and I direct that this my edict be published in Trajan's Forum, that it may be open to all to read it. The prefect Vitrasius Pollio² will see to it that it is sent throughout the provinces. Anyone who wishes to appeal to it and to have it by him must not be prevented from obtaining a copy from the official gazette of our decrees.

¹ An impossible because illegal enactment for Marcus.

² He married Annia Faustina, a cousin of Marcus, and was Consul in 176. If *praef praet* at all he must have succeeded Macrinus Vindex who fell in battle in 172.

MISCELLANEOUS LETTERS OF

EX VULCATHI GALIICANI *Vita Avidii Cassii*, v 5 —

EPISTULA MARCI AD PRAEFECTUM SUUM

AVIDIO CASSIO legiones Syriacas dedi diffuentes luxuria et Daphnitis moribus agentes, quas totas excaudantes¹ se repperisse Caesonius Vectilianus scripsit Et puto me non errasse, si quidem et tu notum habeas Cassium, hominem Cassianae severitatis et disciplinae Neque enim milites regi possunt nisi vetere disciplina Seis enim versum a bono poeta dictum et omnibus frequentatum

Moribus antiquis res stat Romana virisque

Iu tantum fac adsint legionibus abunde commeatus, quos, si bene Avidium novi, scio non perituros

Ibid v 9 — RESCRIPTUM PRAEFECTI AD MARCUM

RECTE consulisti, mi Domine, quod Cassium praefecisti Syriacis legionibus Nihil enim tam expedit quam homo severior Graecanicis militibus Ille sane omnes excaudationes,² omnes flores de capite collo et

¹ A later word than the time of Marcus.

² A late word

¹ Furius Victorinus must be meant He was *praef praef*
179 167

MARCUS AURELIUS

LETTER OF MARCUS TO HIS *Praefectus*¹ (*praetorio*)

? 162-163 A D

I HAVE put Avidius Cassius in command of the Syrian army which is dissolved in luxury and living in the moral atmosphere of Daphne² Caesonius Vespasianus described them as indulging wholesale in hot baths And I think I have done right, for you too must have noted Cassius, a man of the old Cassian severity and discipline Nor indeed can soldiers be ruled except by the ancient discipline For you know that line of an excellent poet, which is in the mouths of all

*Rome on her ancient ways and men unshakably standeth*³

You have only to see that the troops are plentifully provided with supplies If I know anything of Cassius⁴ I am certain they will not be wasted

ANSWER OF THE PRAEFECT

? 162-163 A D

You have taken a wise step, my Lord in setting Cassius over the Syrian army There is nothing so salutary for greivized soldiers as a man of unusual strictness Be sure that he will 'knock off all these hot baths for the soldiers, these flowers

² A suburb of Antioch the resort of the idle and dissolute

³ From the *Annals* of Fennius

⁴ He was not governor of Syria before the end of 164

MISCELLANEOUS LETTERS OF

sinu militi excutiet *Annona militaris omnis parata est, neque quisquam deest sub bono duce.*¹ non enim multum aut quaeritur aut expenditur

Ibid i 6 — *EX EPISTULA VERI AD MARCUM*

AVIDIUS CASSIUS avidus est, quantum et mihi videtur et iam inde sub avo meo, patre tuo, innotuit, imperii. quem velim observari iubers Omnia enim nostra ei displicent, opes non mediocres parat, litteras nostras ridet, te philosophum amiculam, me luxuriosum morionem vocat Vide quid agendum sit. Ego hominem non odi, sed vide ne tibi et liberis tuis non bene consulas, quom talem inter praecinctos habeas, qualem milites libenter audiunt, libenter vident.

Ibid ii 1 — *RESCRIPTUM MARCI DE AVIDIO CASSIO*

EPISTULAM tuam legi sollicitam potius quam imperatoriam et non nostri temporis Nam si ei divinitus debetur imperium, non poterimus interficere, etiamsi velimus Scis enim proavi tui dictum *Successorem suum nullus occidit* Sin minus, ipse sponte

¹ A late word for *legatus*

MARCUS AURELIUS

from their heads and necks and breasts The soldiers' corn supply is all provided, and nothing is wanting with a good general in command, for his requirements and his expenses are equally moderate

FROM A LETTER OF VERUS TO MARCUS

? 166 A D

AVIDIUS CASSIUS, if my judgment counts for anything, is avid for empire, as was already patent under my grandfather,¹ your father I would have you keep a watchful eye upon him He dislikes our whole regime, he is gathering great wealth, he ridicules our letters, he calls you a philosophizing old woman, me a profligate simpleton See what had better be done Personally I do not dislike the man, but you must consider whether you are acting fairly by yourself and your children in keeping ready equipped for action such a leader as the soldiers gladly listen to, gladly see.

ANSWER OF MARCUS ABOUT AVIDIUS CASSIUS

? 166 A D

I HAVE read your letter, which savours more of the alarmist than the Emperor, and is out of keeping with the times For if the empire is destined by heaven for Cassius we shall not be able to put him to death, however much we may desire it You know your great grandfather's saying, *No one ever killed his own successor*² But if the empire is not so destined,

¹ Lucius like Marcus, was officially and by adoption son no grandson, of Pius though he was also son in law of Marcus. ² See Suet. Tit 92.

MISCELLANEOUS LETTERS OF

sine nostra crudelitate fatales laqueos incident. Adde quod non possumus reum facere quem et nullus accusat et, ut ipse dicis, milites amant. Deinde in causis maiestatis haec natura est, ut videantur vim pati etiam quibus probatur. Scis enim ipse quid avus tuus [Hadrianus] dixerit. *Misera condicio imperatorum, quibus de adfecta tyrannide nisi occisis non potest credi*. Eius autem exemplum ponere malui quam Domitiani, qui hoc primus dixisse fertur Tyrannorum enim etiam bona dicta non habent tantum auctoritatis, quantum debent.

Sibi ergo habeat suos mores, maxime quom bonus dux sit et severus et fortis et reipublicae necessarius. Nam quod dicis liberis meis cavendum esse morte illius, plene liberi mei pereant, si magis amari merebitur Avidius quam illi, et si reipublicae expediet Cassium vivere quam liberos Marci.

EX IULII CAPITOLINI *Vita Albini*, x 6—MARCUS
AURELIUS ANTONINUS IRAEFECTIS SUIS SALUTEM

ALBINO ex familia Ceioniorum, Afro quidem homini sed non multa ex Afris habenti, Plautilli genero, duas cohortes alares regendas dedi. Est homo exer-

¹ Suet. *Dom.* 20

² Marcus had two *praef. praet.* at once only between 169 and 172, viz. M. Bassaeus Rufus and Macrinus Vindex.

MARCUS AURELIUS

he will himself of his own accord, without any harsh measures on our part, be caught in the toils of Fate, let alone the fact that we cannot treat as a criminal a man whom no one impeaches and, as you say, the soldiers love. Besides, in cases of high treason, it is inevitable that even those who are proved guilty should seem to be victims of oppression. For you know yourself what your grandfather Hadrian said: *Wretched indeed is the lot of princes, who only by being slain can persuade the world that they have been conspired against!*¹ I have preferred to father the remark on him rather than Domitian, who is said to have made it first, for in the mouths of tyrants even fine sayings do not carry as much weight as they ought.

Let Cassius then go his own way, more especially as he is an excellent general, strict and brave and indispensable to the State. For as to what you say that the interests of my children should be safeguarded by his death, frankly, may my children perish, if Avidius deserves to be loved more than they, and if it be better for the State that Cassius should survive than the children of Marcus.

MARCUS AURELIUS ANTONINUS TO HIS PRAEFFECTS,² GREETING 169-172 A.D.

To Albinus,³ of the family of the Ceionii, an African indeed but with not much of the African in him, the son-in-law of Plautillus, I have given the command of two cavalry cohorts. He is a man who has

¹ After the death of Commodus in 193 Albinus, then governor of Britain, became a competitor for the empire, but was defeated by Severus and slain.

MISCELLANEOUS LETTERS OF

citatus, vita tristis, gravis moribus Puto eum rebus castrensibus profuturum, certe obfuturum non esse satis novi Huic salarium duplex decrevi, vestem militarem simplicem sed loci sui stipendium quadruplum Hunc vos adhortamini, ut se reipublicae ostendet habiturus praemium quod merebitur

Ibid x 9 —EX EPISTULA QUA IDEM MARCUS AVIDII CASSII TEMPORIBUS DE HOC EODEM SCRIPSIT

LAUDANDA est Albini constantia, qui graviter deficientes exercitus tenuit, quom ad Avidium Cassium confugerent Et nisi hic fuisset, omnes fecissent Habemus igitur virum dignum consulatu, quem sufficiam in locum Cassii Papirii, qui mihi exanimis prope iam nuntiatus est Quod interim a te publicari nolo ne aut ad ipsum Papirium aut ad eius adfectus perveniat, nosque videamur in locum viventis consulem subrogasse

EX AELII SPARTIANI *Vita Pescennii*, iv 1 —MARCUS ANTONINUS AD CORNELIUM BALBUM

PESCENNIUM mihi laudas Agnosco nam et decessor tuus cum manu strenuum, vita gravem, et iam

MARCUS AURELIUS

seen service, is of austere life and serious character I think that his appointment will be of advantage to the army, that it will not be disadvantageous, I am sure I have granted him double allowances, a simple military robe, but four times the pay of his rank Exhort him to shew himself a pattern to the State for he is assured a reward equal to his deserts

FROM A LETTER ABOUT ALBINUS WRITTEN BY MARCUS
DURING THE REBELLION OF AVIDIUS CASSIUS

? 175-176 A D

THE loyalty of Albinus is worthy of all praise in that he kept to their allegiance troops that were seriously disaffected, when they were ready to go over to Cassius And had he not been on the spot, the defection would have been general In him then we have a man worthy of the consulship, and I will appoint him in the room of Cassius Papirius, who, as I have just been told, is dying But I would rather not have this appointment made public at present, that it may not get to the ears of Papirius himself or his relations, lest we seem to have elected a consul to take the place of one who is still alive

MARCUS ANTONINUS TO CORNELIUS BALBUS

Circa 178 () A D

You praise Pescennius¹ to me I am not surprised, for your predecessor also spoke of him as energetic in action, serious in character, and even

¹ Pescennius Niger like Albinus became a claimant for the empire, but was defeated and slain by Severus

tum plus quam militem dixit. Itaque nisi litteris recitandis ad signa, quibus cum trecentis Armenicis¹ et centum Sarmatis et mille nostris praesse iussi. Iam est ostendere hominem non ambitione, quod nostris non convenit moribus, sed virtute venisse ad eum locum, quem avus meus Hadrianus, quem Traianus non nisi exploratissimis dabat.

EX VULGATI GALICANI *Ita Iulii Cassii, ix 7 —*
EPISTULA MARCI AD FAUSTINAM

VERUS mihi de Audio verum scripserit, quod cuperet imperare. Audisse enim te arbitror, quod heri² statores de eo nuntirent. Veni igitur in Albanum, ut tractemus omnia dis volentibus, nil timens.

Ibid ix 11 — EPISTULA FAUSTINAE AD MARCUM

ITHA in Albanum cras, ut iubes, veniam. Tamen iam hortor ut, si amas liberos tuos, istos rebelliones acerrime persequaris. Male enim adsueverunt duces et milites qui, nisi opprimuntur, oppriment.

¹ A late form not recognised in the dictionary.

² I litore tend *Veni*. For this Martius Verus see Dio, lxxi 23, § 3.

MARCUS AURELIUS

then more than a mere soldier. And so I have sent a letter to be read to the troops, in which I have given him the command of three hundred Armenians and a hundred Sarmatians and a thousand regulars. It is your part to shew that the man has reached this rank, which my grandfather Hadrian and my great-grandfather Trajan reserved for the most tried soldiers, not by partiality, which is abhorrent to our principles, but by merit.

MARCUS TO FAUSTINA

175 A.D.

VERUS was verity itself when he wrote to me of Cassius that he coveted the empire. For I suppose you have heard what news messengers brought of him yesterday. So come to Albanum¹ that by the Gods' goodwill we may deal with the situation, and do not be alarmed.

FAUSTINA TO MARCUS

175 A.D.

I WILL come myself as you suggest to Albanum to-morrow. But in the meantime I urge you, as you love your children, take the severest measures against these rebels. For the morale of generals and soldiers is thoroughly bad, and unless you crush them they will crush us.

¹ The villa of Domitian on the Alban hills. This afterwards became the town of Albanum.

MISCELLANEOUS LETTERS OF

Ibid x 1 — EPISTULA FAUSTINAE AD MARCUM

MATER mea Faustina patrem tuum Pium [eiusdem] in defectione Celsi cohortata est ut pietatem primum circa suos servaret, sic circa alienos Non enim pius est imperator, qui non cogitat uxorem et filios Com-
modus noster vides in qua aetate sit, Pompeius gener et senior est et peregrinus Vide quid agas de Avidio Cassio et de eius consensu Noli parcere hominibus qui tibi non pepercerunt, et nec mihi nec filius nostris parcerent, si vicissent Ipsa iter tuum mox consequar Quia Fadilla nostra aegrotabat, in Formianum venire non potui Sed si te Formis in venire non potuero, adsequar Capuam, quae civitas et meam et filiorum nostrorum aegritudinem poterit adiuvari Soteridam medicum in Formianum ut dimittas rogo Ego autem Pisithio nihil credo, qui puellae virgini curationem nescit adhibere Signatas mihi litteras Calpurnius dedit, ad quas rescribam, si tardavero per Caecilium senem spadonem, hominem ut scis fidelem Cui verbo mandabo quid uxor Avidii Cassii et filii et gener de te iactare dicantur

Ibid xi 2 — RESCRIPTUM MARCI AD FAUSTINAM

Tu quidem, mea Faustina, religiose pro marito et pro nostris liberis agis Nam relegi epistolam tuam

¹ He married Lucilla, the daughter of Marcus and widow of Lucius Verus He was Consul II in 173

² Born about 150 She married Claud Severus.

MARCUS AURELIUS

FAUSTINA TO MARCUS

175 A D

My mother Faustina exhorted your father Pius, on the revolt of [the same] Celsus, that he should shew loyalty in the first place to his own family and then to others. For an Emperor cannot be called *Pius* who does not think of wife and children. You see how young our Commodus is. Pompeianus, our son in law,¹ is both aged and a provincial. See how you deal with Avidius Cassius and his accomplices. Spare not men who have not spared you, and would have spared neither me nor your children, had they succeeded. I will myself soon follow you on your journey. As our Fadilla² was ill, I could not come to the Formian Villa³. But if I cannot find you at Formiæ, I will go on to Capua, a place which is likely to benefit my health and our childrens. I beseech you send Soteridis the physician to the Formian Villa. I have no faith in Pisitheus, who does not know how to cure our little maid⁴. Calpurnius gave me the sealed letter to which I will send an answer. If I fail to get it off at once, by Caecilius the old eunuch, a man, as you know, to be relied on, I will entrust him with an oral message of what the wife of Avidius Cassius and his children and son in law are reported to say about you.

ANSWER OF MARCUS TO FAUSTINA

175 A D

THE anxiety which you shew for your husband and our children, my Faustina, is natural. For I have

¹ We know of no imperial villa here.

² An inscription (Corp. Inscr. Græc. 1104 b) found at Tibur was dedicated to Artemis *ὡς ἐν Περσέϊ* as a *ἱερὸν καὶ ἁγίον*.

in Formiano, qua me hortaris ut in Avidii conscios vindicem. Ego vero et eius liberis parcam et genero et uxori, et ad senatum scribam, ne aut proscriptio gravior sit aut poena crudelior. Non enim quicquam est quod imperatorem melius commendet gentibus quam clementia. Haec Caesarem deum fecit, haec Augustum consecravit, haec patrem tuum specialiter Pii nomine ornavit. Denique, si ex mea sententia de bello iudicatum esset, nec Avidius esset occisus. Esto igitur secura.

Di me luentur, dis pietas mea cordi est

Pompeianum nostrum in annum sequentem consulem dixi

¹ See *Vit Avid Cass* 12

² The name *Pius* was given him either because of his benevolent and gracious disposition (as here and *Capit Vit Hadr* ii 7) or because of his dutiful loyalty to Hadrian. *Pietas*

MARCUS AURELIUS

read your letter again in the Formian Villa, in which you urge me to take vengeance on the accomplices of Cassius. But I intend to spare his children and son in law and wife,¹ and I shall write to the Senate not to permit any severer persecution or harsher penalty being inflicted on them. For there is nothing that can commend an emperor to the world more than clemency. It was clemency that made Caesar into a God, that deified Augustus, that honoured your father with the distinctive title of Pius.² Finally, if my wishes had been followed in respect to the war, not even Cassius would have been slain. So do not be troubled.

*The Gods protect me, to the Gods my loyalty is dear*³

I have named our Pompeianus⁴ consul for the ensuing year.

meant a conscientious sense of duty or loyalty to the Gods or country or relations or mankind in general!

¹ Hor. *Od.* i. 17. 13.

⁴ Claud. Pompeianus Quintianus, not the son in law of Marcus, was *consul suffectus* in 176.

MISCELLANEOUS LITERS OF

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DESCRIPTIVE PROSPECTUS ON APPLICATION

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- (d) if, with intent to defeat or delay his creditors,—
- (i) he departs or remains out of British India,
 - (ii) he departs from his dwelling house or usual place of business or otherwise absents himself,
 - (iii) he secludes himself so as to deprive his creditors of the means of communicating with him,
- (e) if any of his property has been sold in execution of the decree of any Court for the payment of money,
- (f) if he petitions to be adjudged an insolvent under the provisions of this Act,
- (g) if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts or
- (h) if he is imprisoned in execution of the decree of any Court for the payment of money

Explanation —For the purposes of this section the act of an agent may be the act of the principal

Act of Insolvency This section does not define the expression "act of insolvency" but simply mentions the several cases in which the debtor is to be taken as having committed an act of insolvency. Cf *Bulomal v Soomar Khan* AIR 1928 Sind 177 112 I C 646 In order to be an act of insolvency the act must be within the meaning of the section Cf *Muthu Chettiar v Vagindas* 28 Bom L R 680 (a case under Presl T Insolv Act) The list of the cases mentioned in this section in which a debtor commits an act of insolvency is almost the same as that in section 1 (1) of the Eng Bankruptcy Act 1914 (as amended in 1926) Acts of Bankruptcy are of three kinds namely (1) those which arise from dealings by a debtor with his property (2) those which consist of personal acts or defaults committed by him and (3) those which arise from the conditions of his affairs showing him to be an insolvent. The essence of the first two classes of the acts lies in

the intention of the debtor to avoid or evade the payment of his debt, see Halsbury's *Law of England*, Vol II, p 13 Cf *Banker v Burdakin*, (1843) 11 M & W 128, *Stuart v Moody*, Cr M & R 777, *Ponnusami v Narasimma* 25 M L J 545 (548) 21 I C 293 14 M L T 305 It should be noticed that the above acts of insolvency with the exception of those mentioned in cls (e) & (h) are *acts of commission* Cls (e) & (h) specify the ways in which a debtor may be forced into acts of insolvency Cf *Lachmi Chand v Behin Behari*, 32 C W N 16

The commission of an act of insolvency by the debtor entitles both the creditor and the debtor to present an insolvency petition subject to the provisions of sections 9 and 10 respectively and the Court may on such petition make an order adjudging the debtor an insolvent, sec 7, below An act of insolvency has got this importance that it gives a cue to the external world that the affairs of a debtor have become embarrassed and that it is therefore of great importance that he should be brought under the operation of law at an early date, *Ex parte Chinery* 12 Q B D 342 For a bankruptcy notice, see *Herbert v Higgins* 95 L J Ch 303 The effect of an act of insolvency once unequivocally committed cannot be whittled down by pretentious pleas Cf *In re Shivalal Rath* 40 I C 207 (Bom) *In re Dhunput Singh* 20 Cal 771 (on appeal, 23 Cal 26 P C) Where the debts come into existence subsequent to the so-called act of insolvency the creditor is not entitled to rely on the said act of insolvency to have the debtor adjudicated an insolvent see *Muthiar Chelliar v Lakhshminarsha*, 1 L W 141 61 I C 56 (1920) M W N 1571 (97)

Acts of Insolvency to be strictly construed Words defining act of insolvency should be strictly construed, because commission of such an act entails disabilities on the person committing it *Ex parte Chinery* (1884) 12 Q B D 343 (346), *Re H B* (1904) 1 K B 91 Cf *Lulomal v Soomar Khan*, AIR 1928 Sind 177 112 I C 646 *Mercantile Bank v Official Assign*, 30 Mad 250 39 I C 942 Adjudicating a person an insolvent is a matter of serious consequences and Courts of Law should take particular care to see that the provisions of the law in the matter are strictly observed and carefully considered *Veerayya Chetty v Doraiswami*, AIR 1928 Mad 393 110 I C 37

Act of Insolvency when not to be scrutinised Where the insolvent himself gives evidence saying that he is unable to pay the debts and where the situation is as if he is himself the petitioner there is no use closely scrutinising the act of insolvency *Periya Karuppan Chelliar v Angappa Chelliar*, AIR 1925 Mad 483 21 L W 52 86 I C 229

What are not Acts of Insolvency A mere intimation to a creditor by the debtor or his agent that the debtor is insolvent or is "in difficulties" does not amount to an act of insolvency. Cf *Mercantile Bank v Official Assignee*, 39 Mad, 250. Or, in other words, a bare declaration of inability to pay debts is no act of insolvency, *Rama Suami Chettiar v Muthialusami*, AIR 1928 Mad 903 109 IC 83, *Leerajja Chetti v Doraiswami*, *Supra* In re a Debtor, (1929) 1 Ch 362 98 LJ Ch 38. A trader has a right to go abroad to look after his concerns, and it will not be an act of insolvency though his creditor may thereby be delayed, *Harner v Barber*, Holt 175, *Ex parte Mutril*, 5 Ves 574. The mere failure to keep an appointment made with a creditor is not an act of bankruptcy, *Key v Shaw*, 8 Bing 320, *Toleman v Jones*, 9 Moore C P 24. Absenting oneself, unless from the place of abode or place of business or to avoid a creditor, is not an act of bankruptcy, *Bernasconi v Farebrother*, 10 B & C 549. Purchasing goods from one creditor and selling them in retail and utilising the sale proceeds to pay off other creditors are not acts of insolvency, *Durga Ram v Harkishen*, 23 ALJ 536 LR 6 A 415 (clv) AIR 1925 All 564 88 IC 440. Likewise, omission to keep account for some time or want of necessary vigour in carrying on business will not constitute an act of insolvency, *Ibid*.

Act of Insolvency of a Firm An act of insolvency committed by a person in his capacity as a partner of a firm and on behalf of the firm is regarded as an act of insolvency of the firm, see Mayne's Partnership, p 432. Every partner of a firm, and in fact the entire firm itself, can be adjudged insolvent in respect of acts done by any partner on behalf of the firm, *Ghanshamdas v Sasson & Co*, AIR 1926 Sind 90 93 IC 448. No doubt, in order to sustain a joint adjudication against two or more persons, it is necessary that some act of insolvency shall have been committed by each of them. But the act of insolvency may be a joint act committed by one partner on behalf of himself and as agent of others or as a matter of fact, it may be committed by a person who is not a partner, but a mere agent and his authority need not be special or explicit. The act of partner who gives notice that his firm has suspended or is about to suspend the business is *prima facie* a joint act on behalf of all persons who are liable as partners in that firm, unless they can show that they were solvent and able to pay the debts of the firm, *In re David Sassoon & Co* 22 SLR 273 AIR 1927 Sind 155 100 IC 189. It has however been held by the Calcutta High Court that a notice of suspension of payment by one partner is not an act of insolvency for the other partners, *Debendra v Pursollam*, 55 IC 186 (Cal). Nor will the attachment and sale of the

separate property of one partner operate as an act of insolvency of the firm, see 51 M L J 326, cited under cl. (e) at p 64

Onus of proving Act of Insolvency The onus of proving an act of insolvency is on the party who relies on it as the foundation of his right to present an insolvency petition, (1882) 22 Ch D 436 Where the surrounding circumstances raise a presumption that a particular transaction is a bankruptcy act, the onus is shifted on to the other side who alleges the contrary, see *Ex parte Kilner*, 13 Ch D 245 Cf (1877) 5 Ch D 979 When one partner gives notice that the firm has suspended payment, the onus is not on the creditor to prove that that partner had authority from the other partners to give the notice, *Re David Sassoon & Co*, A I R 1927 Sind 155 100 I C 389, *Ganga Prasad v Madhuni*, 25 A L J 331 A I R 1927 All. 352 100 I C 550 Where on a creditor's petition the debtor himself swears to his inability to pay, there is no purpose in closely scrutinising the acts of insolvency, *Periya Karuppan's Case*, *supra* Where an assent by a creditor to a transfer is set up as a bar to such creditor relying on the transfer as constituting an act of bankruptcy, the burden of proving such assent is on the party alleging it, *Re Michael*, 8 Mar 305

Estoppel or waiver with respect to Act of Insolvency :

A creditor who is a party, or privy, to a transaction cannot rely on it as an act of insolvency, *Official Receiver v Soma Sundaram* *infra* *Re Sunderland*, (1911) 2 K B 658, *Re Brindley*, (1906) 1 K B 377, *Re Mills*, (1906) 1 K B 389, *Bamford v Baron* 2 T R 591, *Marshall v Barkworth*, 4 B & Ad 508 *I* vide also notes and cases at p 61, *infra* A creditor who accepts an assignment deed executed by the insolvent will be precluded by his conduct from relying on the execution of the said deed as an act of bankruptcy, *Re a Debtor*, 94 L J Ch 42 Cf *Rukmani Ammal v Rajagopala*, 48 Mad, 294 47 M L J 425 A I R 1924 Mad 839 84 I C 281 If after the execution of a deed of arrangement, the creditor makes unnecessary delay in filing his petition for adjudicating his debtor, such delay may amount to acquiescence, and he will be estopped from relying on the deed as an act of bankruptcy, *Re a Debtor* 95 L J Ch 199 Cf *Ex parte Stray*, L R 2 Ch 374

Clause (a) An assignment to trustees for the benefit of creditors is an act of insolvency under this sub section, *Hassamal v Kotumad* 6 S L R 183 10 I C 443 In the Act of 1907, the words *all or substantially all*, did not occur, so will not amount to an act of insolvency The transfer must be in respect of the *entire* property or to such an extent that

it practically leaves nothing for the insolvent. The transfer of a part of the property may not be within the mischief of the section, *Re Spackman*, (1890) 24 Q B D 728 (738) *

The transfer must be to a third person and not to a creditor. Cf *Lipton Ltd v Bell*, (1924) 1 K B 701. The creditor may, however, in another capacity be regarded as a third person within the meaning of this clause. The words "third person" are not intended to exclude the conveyance to some of the creditors themselves as trustees for the general body of creditors, *Official Receiver of Trichinopoly v Som Sundaram*, 30 M L J, 415 34 I C 602. Ordinarily, the debtor conveys his property to a trustee for payment of his debts, and the transaction gives rise to an act of insolvency, and the creditors may at once apply for an adjudication order, as they are not bound to wait and accept a deferred payment from the hands of a trustee. In *re Brijmohan Dobay* 2 C W N 306, also see *Official Receiver of Trichinopoly v Soma Sundaram* 30 M L J 415 34 I C 602. *Re Hood*, (1872) 7 Ch App 302, 305. Until the creditors assent to the trust deed, there is no trust and the trustees occupy no better position than that of trustees *de son tort*, and on the bankruptcy of the debtor they will be bound to hand over the assets to the Receiver. *Hassomal v Kotumad*, 6 S L R 183 19 I C 443. As to the position of a creditor who does not assent to a deed of arrangement see also *Re Ellis Myttenacre*, 94 L J 239 (1925) 1 Ch 564. An assignment by a debtor of all his property for the benefit of all his creditors generally constitutes an act of insolvency under this section and will justify an application, *Brijmohan v Bungshidhar supra*. *Karsandas v Maganlal*, 26 Bom 476. A transfer for the benefit of particular creditors does not fall within this clause, though it may fall within Cl (b) if satisfying the conditions of that clause. Cf *Re Sanmare* (1907) 2 K B 170.

In this section "Property" includes money and "Transfer" includes a gift. In *re Umbica Nandan Biswas* 3 Cal, 434. It does not matter whether the transfer be voluntary or not, *Monmohan Das v McLeod*, 26 Bom, 765. Question of intention never enters into the consideration of an act under this Clause, *Re Hood* (1872) 7 Ch App 302, 305. In order to bring a case within the purview of this sub clause (a), the transfer must be for the benefit of the insolvent's creditors generally, so where the transfer is for the benefit of one class of creditors, it will not be an act of insolvency under this clause,—not being for creditors generally—but it may amount to a fraudulent transfer under Cl (b), provided there is an

* A transfer of the insolvent's property to a trustee for the benefit of creditors is technically known as an assignment in bankruptcy see *Lipton Ltd v Bell* (1924), 1 K B 701.

intention to that effect, *Re Phillips, Ex parte Barton*, (1900) 2 Q B 329

Though the transfer be for the benefit of the creditors, still it will be an act of insolvency, for this simple reason, that it may have the effect of deferring payment, the creditors are not bound to wait, they may proceed to have the insolvent's assets distributed at an early date, *In the matter of Brij Mohun*, 2 C W N 306 affirmed in 2 C W N 335, see also 26 Bom, 765, *In re Rces*, L J 29 Ch & Bl 7, *In re Wood*, L J 7 Ch App 302 Cf *Khoo Kiat v Wool Talk*, 19 Cal, 224 (P C) An assignment by a debtor of his entire property for the benefit of his creditors divests him of any interest which can be the subject of attachment subsequently issued in execution of a decree against such debtor until the trusts of the deed of assignment have been carried out, *Lalchand v Hussainno*, 22 S L R 1 A I R 1927 Sind, 78 97 I C 257 The question of *bona fides* seems to be immaterial under this sub clause Cf (1890) 24 Q B D 728 (741), *supra*, and 2 C W N 306, *supra*, it should be noticed that there is no question of intention to defeat or delay &c, and the same need not be proved hereunder, inasmuch as the necessary effect of the conveyance or assignment is to defeat or delay his creditor and to prevent his property from being administered under the Bankruptcy Law, *Re Wood*, (1872), 7 Ch App 302, *Dutton v Morrison*, (1810) 7 Ves 194, *Ponsford v Walton*, (1868) L R 3 C P 167, *Ex parte Henley* (1862) 1 De G J & S 273

British India—means "all territories and places within His Majesty's dominions which are for the time being governed by His Majesty through the Governor General of India or through any Governor or other officer subordinate to the Governor General of India," see sec 3—(7) of the General Clauses Act (N of 1897) An Act of Insolvency by transfer of the debtor's property under clauses (a), (b) and (c) may be committed by the debtor either in British India or without it, Cf *Ex parte Blain* (1879) 12 Ch D 522 See also *Cooke v Logeler*, (1901) 1 C 102 *Ex parte Crispin*, (1873) L R 8 Ch App 374 21 W R 491 But the petition for insolvency must be presented to a Court having jurisdiction in any local area in which the debtor ordinarily resides or carries on business or personally works for gain or is in custody See sec 11, *post* The expression "or elsewhere" clearly shows that a bankruptcy act can be committed abroad,—(1879) 12 Ch D 522 For the case of a foreigner carrying on business in India, see *Yokohama Specie Bank v Curlender & Co*, 43 C L J 436 A I R 1926 Cal 898 96 I C 159

Composition deed—an Act of Insolvency. The execution of a composition deed by a debtor amounts to an act of

insolvency *Lalcl and Khushaldas v Hussainio* 22 S L R 1 A I R 1917 Sind 78 9- I C 157, relying on 26 Bom, 4,6

Clause (b) Under this sub clause a transfer of property with intent to delay or defeat creditors is an available act of insolvency, *Debendra v Purusottam*, 55 I C 186 (Cal) the transfer need not be in respect of *all* or *substantially all* the properties of the debtor it will do if it be in respect of any *part* of his property—but it must be *with intent to defeat or delay his creditors* and the provision as to *place* where the property exists and the conveyance as made in this clause is the same as in the previous one Cf *Re Hood* L R 7 Ch app 307 This sub-clause does not require the transfer to be to a *third person* so transfer to one of the creditors may give rise to an act of insolvency Cf *Krishna Das v Raja Ram*, A I R 1930 All 287 1930 A L J 30 The language of this section is somewhat similar to that of Sec 53 of the Transfer of Property Act In this connection the following cases may be referred to—Cal 185 7 Cal 198 9 C W N 225 P C 20 Mad 3 6 22 Bom 177 29 Bom 478 The object of this section is quite different from that of sec 53 T P Act This latter section proposes to avoid the transfer but the object of the present section is to indicate when an act of insolvency will be committed to enable the presentation of a petition of insolvency either by the debtor or by the creditor So there is a radical difference between the objects of this section and sec 53 T P Act and therefore the common words in these two sections may not have exactly the same significance Therefore in this section a transfer need not be an actual transfer a mere show of transfer will amount to an act of insolvency under sub clause (b) of sec 6 provided it is with intent to defeat or delay his creditors The creation of a document by a debtor purporting to transfer his property to another with the intention of putting the property nominally in the name of that other while retaining the beneficial interest in the debtor himself would amount to an act of insolvency if done with the intention of delaying or defeating creditors it does not matter that there was no intention to give effect to the transfer *Secretary of State v Nagiah* 25 M L T 17 36 M L J 180 50 I C 593 see also 33 Mad 334 20 M L J 211 The deed of assignment will operate as an act of insolvency not *withstanding the fact that it has not been perfectly executed* for instance where the insolvent executes the deed but which has still to be executed by his partner *Ex parte Snowball Re Douglas*, (182) 5 Ch App 534

The absence of a proper stamp will not prevent the execution of a deed from constituting an act of insolvency *Ex parte Squire* (1868) 4 Ch App 47 Under the Transfer of Property Act a transfer by a debtor of his property to a creditor

is not within the mischief of sec 53 thereof, 3 All, 530, 30 Md, 6, 3, Md, 334, 6 C L J, 410, 34 Cal, 99, 2 A L J 604, but such a transaction under the Insolvency Act may give rise to an act of insolvency. The provisions of section 53 of the T P Act do not, in any way, affect the provisions of this section, vide the new sec 53 of the T P Act. A collusive suit brought by a debtor and its subsequent withdrawal or compromise of the same with the object of putting another party in possession of immoveable property may amount to a transfer of property by the insolvent within the meaning of sec 6 (b) *Parannath v Al argir*, 13 A L J 434 29 I C 217.

To bring a transaction within the meaning of clause (b) there must be a fraudulent intention on the part of the debtor, *Re Shackman*, (1890) 24 Q B D 728.

Fraudulent intention (-37) The element of fraud involved here must be legal fraud upon the creditors and not a mere moral fraud, see *Re Wood* (1872) 7 Ch App 302. That is to say the transaction should be a regular design to prevent the distribution of the insolvent's assets among his creditors in accordance with the bankruptcy laws *Dutton v Morrison* (1810) 17 Ves 194, *Ex parte Chaplin*, *Re Sinclair* (1884) 26 Ch D 319. Cf *Official Assignee v Yokohama Specie Bank Ltd* 29 C W N 374. So where good faith is established neither sale nor mortgage will be an act of insolvency, *Rose v Haycock*, (1834) 1 Ad & El 460.

The question whether a certain transfer of property has been made with 'intent' to delay or defeat the creditors within the meaning of section 6 (b) is not a question of law but merely one of fact *Har Parshad v Bhagawat Singh* 85 P L R 1917 36 I C 504 102 P R 1916. Such a fraudulent intention may be inferred from the surrounding circumstances and need not always be proved *Re Wood*, (1872) 7 Ch App 302, *Yaramati Krishnappa v Chindra Papayya*, 20 Mad, 326. Cf *Dutton v Morrison* (1810) 17 Ves 194, *Ponsford v Walton*, (1868) L R 3 C P 16. For an instance of a case where motive is regarded as immaterial the intention to defraud being presumed from circumstances see *Re David & Adlard*, (1914) 2 K B 694. In *Ramathai Iyer v Kaniappa* 51 Mad 495 27 L W 508 55 M L J 235 AIR 1925 Mad 480 110 I C 167, a mere perusal of documents was considered sufficient to show that the debtor received no present advantage by transferring a greater part of his property. See also *Official Assignee v Moideen Kowther*, 50 Mad 948 AIR 1927 Mad 1013.

An assignment by a debtor of his property in consideration of a past debt is an act of bankruptcy, Assignment for past debts *Re Phillips* (1000) 2 Q B 329, *Worsley v De Mattos* (1758) 1 Bur 467. In *re Davnis*, *Ex parte Miles*, (1921) 3 K B 628 (631) Thus

is however not so when the debt was advanced on the debtor's undertaking to give security for it at a subsequent time, *Harris v Rickett*, (1850) 28 L J (Q B) 197, *Ex parte King*, (1876) 2 Ch D 256 *Ex parte Izard*, (1874) 9 Ch App 271. But the onus of proving such undertaking or agreement must be on the person who alleged it, *Ex parte Kilner Re Barker*, (1870) 13 Ch D 245, see also *Kalamalai v S T Export Co*, 33 Mad, 334 20 M L J 211. A bona fide assignment for a present equivalent *per se* is not act of insolvency, *Ross v Haycock*, (1834) 1 A D & E L 460, *Merrier v Peterson*, (1868) L R 4 Ex Ch 104. An assignment partly to secure an existing debt and partly to secure a future advance is not necessarily an act of bankruptcy, *Allen v Bonnet*, (1870) 5 Ch App 577, *Ex parte Wilkinson* (1882) 22 Ch D, 788. Such future advance must be taken for the purpose of continuing the business and must not be used as a device, *Ex parte Johnson, Re Chapman* (1884) 26 Ch D, 338, Cf (1894) A C 135. An assignment of the stock in-trade by a letter of hypothecation is an act of bankruptcy, *Re Ambrose Summerse*, 23 Cal, 592.

Clause (c) Under the Act of 1907 there was a difference between the clauses (b) and (c) in respect of the subject-matter of transfer, in clause (b) we had "his property or any part thereof" and in clause (c) we had "his property or any part thereof or of any interest therein". From the present clause (c) the words "any interest etc." have been omitted.

The difference in the language of clause (a), (b) and (c) should not be lost sight of. Under clause (a) the transfer should be to a third person for the benefit of his creditors generally and the transfer should embrace the whole or substantially the whole of the insolvent's property. But under clause (b) the object of the transfer is to defeat or delay the creditors, and the transfer may be in respect of even a part of the property. Under clause (a) the intention of the debtor is generally an honest one. A transfer under clause (b) must necessarily be a dishonest one. Clause (c) does not require the transfer to be to a third person or with intent to defeat or delay the creditors. The words "fraudulent preference" indicate that the transfer is meant to be in favour of a creditor, though it may be in the name of a third person.

The execution of a document which comes under sec 54 of the Act amounts to an act of insolvency, *Krishna Das v Raja Ram*, 1930 A L J 370 A I R 1930 All 282.

Enactments See sec 54 (1) of this Act, and see sec 56 of the Presidency-Towns Insolvency Act (Act III of 1909). Some people find in the words "any other enactment" a reference to sec 53 of the T P Act. Perhaps that is not so, because sec 53 does not render the transfer altogether void.

but only voidable nor does it contemplate the contingency of the indebted transferor being adjudged an insolvent. In fact, it is inconsistent with the very spirit of the Bankruptcy law, which aims at equality of distribution of the property of the bankrupt among his creditors, see *Hakimlal v. Mushahar*, 34 Cal 999 at p 1015 11 CWN 889 6 CLJ 410—affirmed by the Privy Council in 43 Cal, 521 23 CLJ 406

Fraudulent Preference The expression must mean preference given to a particular creditor so as to affect the shares of the other creditors upon distribution of the assets of the debtor because the whole object of the Bankruptcy Law is to secure equality of distribution of the property of the bankrupt among his creditors see *Hakimlal v. Mooshahar*, 34 Cal 999 affirmed by the Privy Council in 43 Cal, 521 23 CLJ 406 So a transfer which is not within the mischief of sec 53 of the T P Act may amount to fraudulent preference within the purview of this section. In order to constitute a fraudulent preference there must be the concurrence of three circumstances (1) the trader must contemplate his own immediate bankruptcy (2) he must himself make the distribution, (iii) the distribution must be different from what a Court of bankruptcy would make *Bourne v. Graham* 2 Jur (N S) 1225 A debtor who gives an undue preference to one creditor, by giving him a large proportion of his property so as to reduce the aliquot share of the other creditors acts fraudulently, and the favoured creditor has no title against the assignees representing the creditors generally *Dadoba v. Vishnudas* 12 Bom, 424 In order to constitute an act of fraudulent preference the transfer must be voluntary and not one made under pressure. Preference implies an act of free will and there can be no preference where the act is the result of pressure, *Nripendra Nath v. Ishutosh* 21 CLJ 167 19 CWN 157 29 IC 128 See also *Moula Baksh v. Tezmal* 11 ALJ, 545 20 IC 395 Pressure legalizes the disposition because it rebuts the presumption of an intention on the part of the debtor to act in fraud of the Bankruptcy Law which provides for the equal distribution of his assets among all his creditors. So a mortgage by the debtor to one of the creditors to secure a barred debt did not amount to an act of fraudulent preference—not being a voluntary affair *Brown v. Ferguson* 16 Mad 499 Under an old Mahabharad case a transfer by a debtor of his property to a big creditor of his in part satisfaction of his debts to the latter was held not to constitute an "undue preference," *Joakim v. Secretary of State* 3 All 530 This may however be good law under sec 53 of the T P Act but not so in an Insolvency Act. A deed is void against the creditors when the debtor is in a state of insolvency or when the effect of the deed is to leave the debtor without the means of paying his present debts,

Chidambaram v Srinivasa, 18 C W N 841, P C 33 Mad 334 (affirming 30 Mad, 6) *Vide* also the notes under the heading "Preference" in sec. 54.

As to the cases of transfer which apart from the Bankruptcy Law, will not amount to fraudulent preference, see *Hakimlal v Mushahar*, 34 Cal 999 6 C L J 410 11 C W N 889 (affirmed by the Privy Council in *Mushahar v Hakim Lal*, 43 Cal, 521 23 C L J 406), 4 Mad H C 84, 10 Bom H C. 206 20 M L J 211, 18 M L J 189, 16 Mad 397

A person in insolvent circumstances may dispose of his property in favour of one creditor though the act may have the effect of disappointing other creditors, *Official Assignee of Bombay v Brij Kishore*, 3 A L J 604, A W N (1906) 250 A mere voluntary payment of debt is not an undue preference unless such payment is fraudulent and is made with the intent of diminishing the sum to be divided amongst the creditors, *In re Harmarji* 17 Bom, 313 In deciding whether or not a payment made to a particular creditor amounts to an unfair preference the Courts should be guided by the provisions of the Insolvency Act, *In re William Hastie*, 11 Cal, 451 Whether the preference is fraudulent or not must be determined with reference to the state of the debtor's mind, *Nripendra v Ashutosh*, 43 Cal, 640 20 C W N, 420 33 I C 548 see also *Official Assignee of Bombay v Brijkishore*, 3 A L J 614 A W N (1916) 250

As to whether a creditor who is a party or privy to a transfer by the debtor can rely on the transaction as an act of insolvency for the purpose of proceeding against the insolvent, various opinions have been maintained see *Ex parte Alsop*, (1860) 29 L J (Boy) 7, *Re Tannenberg*, (1889) 6 Morr 49, 60 L T 270, *Ex parte Milner*, (1885) 15 Q B D 605 Acquiescence in the transfer does not however prevent the creditor from availing himself of the benefit of some other act of insolvency committed by the debtor, *Re Mills*, (1906) 1 K B 389 *Vide* notes at p 54

Clause (d) This whole clause is controlled by the condition indicated in the words "with intent to defeat or delay his creditors" The three sub-clauses (i), (ii) and (iii) practically lay down that if the insolvent keeps aloof or conceals himself from his creditors or places himself outside their clutches, being away from India, he will be committing an act of insolvency which will entitle his creditors to proceed against him in an Insolvency Court But all the above acts of self-concealment or seclusion must be coupled with an *intent* to defeat or delay the creditors in order to make this clause operative, *Ex parte, Coates Re Skelton*, (1877) 5 Ch D 979 25 W R 800 So it has been held in *In re Dhunpat Singh*,

20 Cal, 771 (affirmed by P C in 23 Cal 26), that the intent to depart must be proved to be the intent of the insolvent himself, see also *In re William Watson*, 31 Cal, 761 8 C W N 555. In order to adjudicate a person an insolvent, on the strength of this clause, it should be first ascertained whether the debtor departed from the jurisdiction of the Court with intent to defeat or delay his creditors, or with like intent departed from his usual place of business or abode within the jurisdiction *Abu Haji v Haji Jan*, 8 Bom L R 684. The departure must be with an intention to defeat etc, so there is no act of insolvency where the departure is in connection with the business affairs, *Harner v Barber* (1816) Holt (N P) 175. An act may be a bankruptcy act if the intention to delay etc is there, although no creditor be actually delayed thereby *Louch v Cr R*, 4 P & D 686 1 Q B 51, *William v Nunn* 1 Taunt 270, *Fowler v Padget*, 7 T R 509. Leaving his house to avoid his creditors is a sufficient act of bankruptcy though no creditor called in his house, *Hammond v Hicks* 5 Esp 159, *Hodgson's case*, 14 Ves 86. The debtor's intention may be inferred from the surrounding circumstances. Thus a debtor who withdraws to a secluded part of the house to avoid a personal demand of payment or closes his shop against his creditor or shuts his shop and leaves home without instructions or any address to which communications may be made commits an act of bankruptcy. This inference can however be rebutted by evidence that the creditor called at an unearthly hour or by other circumstances pointing to a contrary conclusion see *Ex parte Courtis* (1893) 9 T L R 58. Cf *Horsley In re* (1901) 1 K B 309. Thus, again if a man quits India and remains out of India without providing funds for payment of his dues an intention to delay creditors may be presumed *Kilner In re*, 2 Dea 324, see also *Wolstenholme In re* 4 Mor 258, *Aldeson, In re* (1895) 1 Q B 183 of course this will not be so if the debtor's permanent home is abroad *Ex parte Brandon, In re Trench*, 25 Ch D 500. When a debtor left his place of business with a large sum of money to save it from being attached after having refused inspection of his account books to his creditors, the Court was justified in concluding that the debtor had left the jurisdiction of the Court with intent to defeat and delay his creditors *In re Iranial Sibhapaty*, 21 Bom 297. When a debtor knew that the necessary consequence of his going abroad would be to defeat or delay certain creditors that would justify a conclusion that the going abroad was with intent to defeat or delay creditors *Ex parte Coater* (1854) 30 L T 620, *Pe Bivart v M & A* 722, although his going abroad had nothing to do with the debts *Holt v Vitchhead*, Camp 50. Leaving the place of business and putting up, after

closing the business, a notice under the signature of a pleader requiring creditors to communicate with the pleader are sufficient to constitute an act of bankruptcy, *Re Hira Lal Shrivastava*, 97 I C 446 s c, *Shan Wallace & Co*, A I R 1927 Sind 18. A departure to avoid an arrest is an act of bankruptcy, *Warner v Barbar*, *infra* though under a groundless apprehension, *Ex parte Bamford* 15 Ves 447. The act of insolvency is complete as soon as the departure is made and is not affected by the consideration of any subsequent circumstances, *Ex parte Gardener*, (1812) 1 Ves & B 45. When a bankruptcy petition is sought to be founded on this, the intention to defeat and delay creditors should be specially alleged, *Ex parte Coates*, *Re Skelton*, (1877) 5 Ch D 979 25 W R 800, if there is an omission to do so, the omission may be rectified by an amendment before adjudication, *Re Fiddian*, (1892) 9 Mor 65.

The dwelling house may not be a settled house and may mean one's abode at a public house, *Holroyd v Gwynne*, 2 Taunt, 176 1 Rose, 113.

In sub-clause (ii) we have the most general expression "otherwise absents himself". The Legislature at first specifies the particular instances of departure, self concealment and seclusion and then uses this general expression to cover every conceivable mode of elusion from the creditor. It is not however necessary that the debtor should be corporeally absent, it is sufficient if the debtor *with intent to delay or defeat* his creditors makes it difficult for his creditors to ascertain his whereabouts, as by changing his abode surreptitiously and assuming an *alias*—*Re Alderson*, *Ex parte Jackson* (1895) 1 Q B 183, 193, Cf *Ex parte Meyer*, (1872) L R 7 Ch 188. In *re William Watson*, 31 Cal, 761. Closing up of the shop by the debtor without leaving any trace of him coupled with evidence of evasion of the creditor is indicative of the debtor *absenting himself*, *In re Horsley* (1901) 1 Q B 309 (314). Mere absence for sometime from the village does not come within the meaning of this clause, *Durga Ram v Har Kishen* L R O A 415 23 A L J 536 A I R 1925 All 564 88 I C 440. The question of intention being the keynote of cl (d) the motive that prompts the departure must be looked to. If the insolvent departed with an evil intention his subsequent return or change of mind is of no account. Cf *In re Dholan Das* 13 S L R 189 56 I C 158, *Fisher v Boucher* (1820) 10 B & C 705.

Sub-clause (iii) "*Secludes himself*". Seclusion means corporal retirement or physical concealment so as to prevent access to him or communication with him by his creditor see *Ex parte Foster* (1810) 1 Ves 414. The corresponding words

in the English Statute [see English Bankruptcy Act, 1914 sec 1 (1) (d)] are "begins to keep house" See Robson, p 137 Cf 20 Cal, 771, see *Key v Shau*, 8 Bing 320

This sub clause as well as the two preceding sub-clauses are all subject to the same condition as to the intention on the part of the debtor to delay or defeat his creditors. So the departure seclusion withdrawal, absence, concealment etc on the part of the debtor must be coupled with intent to defeat or to delay creditors

Clause (e) If any part of the debtor's property be sold away in execution of a decree against him for the payment of money he will be supposed to have committed an act of insolvency within the meaning of this section. The property must be actually sold away. It is not enough that it was put up for sale. *Ac Dholan Das* 13 S L R 187 56 I C 158. Where the property sold is not, in fact the debtor's, this clause will have no application. Cf *Harish Chandra v East India Coal Co* 16 C W N 733. This clause does not apply to a person against whom an adjudication order was taking operation. *Lachmichand v Bepin Behari* 32 C W N 716. The attachment and sale of the separate property of a partner in execution of a decree against all the partners in respect of a partnership debt does not amount to an act of insolvency of the other partners. *Rama Sanlara v Firm of V K R Krishna Iyer* 51 M L J 326 24 L W 390 (1926) M W N 977 1 A I R 1926 Mad 96 97 I C 393 Cf 16 C W N 733 (*supra*)

As to what is decree for money, see *Hart v Taraprasunno*, 11 Cal 18. *Irdanath v Somasundaram*, 28 Mad, 473

Clause (f) If the petitions to be adjudged insolvent: This corresponds to sec 1 (f) of the English Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926. A petition by the debtor to be adjudged an insolvent constitutes an act of insolvency and *prima facie* the debtor is entitled to an adjudication unless some ground is shown for the dismissal of his petition. *Kali Kumar v Gopi Krishna* 15 C W N, 12 I C 48. *Uday Chand v Ram Kumar* 15 C W N 213 at p 215, see 12 C L J 400. *Ponnu Suami v Narayan-Suami* 25 M L J 445 14 M I T 304, 21 I C 293. Cf *Re Gopaldas Aurora* 30 C W N 173. *Racharla Narayanappa v Kondigi Bheemappa* A I R 1926 Mad 494 24 L W 219 92 I C 511, presentation of a fresh application for insolvency by the debtor after annulment of a previous adjudication constitutes a fresh act of insolvency. *Jamal Din v Bishambar Dial*, A I R 1929 Lah 72 109 I C 578

Clause (g) : If he gives notice. Notice given by a debtor to any of his creditors that he has suspended, or that

he is about to suspend, payment of his debts amounts to an act of insolvency on his part. *Cf Banarsi Das v Baldeo Das*, AIR 1925 Oudh 222 82 IC 742, *l'assanji Mulji v Mulji Ranchhod*, 28 Bom LR 677. It should be noticed that under this clause it is not the suspension of payment but the act of giving notice of such suspension that affords a cause of action and provides the starting point from which limitation is to be reckoned, *Bulomal v Sumarkhan*, AIR 1928 Sind 177 112 IC 646. Suspension need not mean a permanent stoppage, a notice of suspension *de facto* is enough to give rise to an act of insolvency, *Dwarkanadas Jathermal v David Sassoon & Co*, AIR 1930 Sind 83 121 IC 865. The clause does not afford a continuing cause of action for presentation of an insolvency petition, *Bulomal's case*. *Cf Re Alice Alderson*, (1895) 1 QB 183. Notice may be given orally or verbally—it is not necessary to give a written notice, *Ex parte Nickoll*, (1884) 13 QBD 462 (469). *Cf Re Dainty*, 2 QBD 116. The notice need not be in any particular form, *Gurmukh Singh v Ram Ditta*, AIR 1929 Lah 136 112 IC 132. Notice through a pleader may do, *Re Hira Lal Shiv Narain*, 97 IC 446 AIR 1927 Sind 18. But the notice should be in an unambiguous and decisive form and explicit enough to denote a clear intention to suspend payment. It must be about his intention to suspend payment or his actually suspending payment. A mere notice that the debtor is in insolvent condition or that he is unable to pay his creditors in full is not enough, and will not be looked upon as an act of insolvency. *Merchandise Bank v Official Assignee, Madras* 39 Mad 250 39 IC 942. See also *Narayandas v Chimmam Lal* 49 All 321 25 ALJ 219 AIR 1927 All 266 102 IC 191. *Cf Ex parte Oastler*, (1885) 13 QBD 471 33 WR 126. An admission of indebtedness coupled with a plea of inability to make an immediate repayment is not necessarily an act of insolvency, *Veerayya Chetty v Doraiswami* AIR 1928 Mad 393 110 IC 737. The notice contemplated by this clause is a notice to be intentionally given by the debtor but the intention can be gathered from the circumstances of the case (*Ibid*). A statement that the debtor is unable to pay his debts coupled with the fact that the debtor told his creditors that he intended to deal with them collectively and with one or more of them individually clearly amounts to a notice to suspend payment, *Gurmukh Singh v Ram Ditta*, AIR 1929 Lah 136 112 IC 132. The test for determining whether notice of suspension of payment has been given is whether the words used by the debtor could naturally induce the creditors to believe that the debtor intended to suspend payment, *Dwarkanadas Jathermal v David Sassoon & Co supra*. Mere admission of insolvency is not enough, *Ibid*. See also *In re Miller*, (1901) 1 KB 51.

49 W R 65, *In re Crook* (1890) 24 Q B D 320, *Crook v Morley* (1891) A C 316 Where it is difficult to distinguish between an admission of insolvency and a notice of suspension of payment the circumstances of each individual case are to be looked to and the effect of the words used on the mind of the hearers is to be taken into consideration, see *Dwarkanadas Javhermal's case supra* also *Clough v Samuel* (1905) A C 442 Thus the sufficiency or otherwise of the notice always depends on the particular facts of each case An offer of composition has been construed as a notice of suspension of payment, *In re Debtor*, (1929) 1 Ch 362 98 L J Ch 38 A request to the creditor not to put pressure till the market improves or an offer to settle at a certain percentage is sufficient notice under this section *Re David Sassoon & Co*, A I R 1926 Sind 246 95 I C 453 An intimation that a refusal on the part of the creditor to accept the debtor's offer would oblige the latter to close his business may be construed as a notice of suspension of payment *Dwarkanadas Javhermal's case, supra* A notice of suspension of payment by one partner is not an act of insolvency for the other partners, *Debendra v Pursottam* 55 I C 186 (Cal) But such a notice can be used for showing that the transfers made shortly before bankruptcy were for the purpose of defeating or delaying the creditors, *Ibid* As to meaning of 'suspension of payment,' see 49 All, 321 25 A L J 219 A I R 1927 All 266 102 I C 191, *supra* The expression 'suspended payment of his debts,' means entire suspension of a person's whole indebtedness, *Ibid* While a bare declaration of inability to pay debts does not amount to an act of insolvency it may well be accompanied by such circumstances and might have been in such a context that if the impression produced upon the minds of the creditors receiving it is such as to amount to a statement that debtor is going to suspend the payment of his debts, it might amount to an act of insolvency *Ramaswami Chettiar v Muthialu Swami* A I R 1928 Mad 903 109 I C 83 Consequently, a statement by a debtor in reply to demands by creditors that he has placed all his title deeds in the hands of a third person for the sale of his properties and the discharge of the debts amounts to an act of insolvency, *Ibid Comp Clough v Samuel*, (1905) A C 442 and *Crook v Morley*, (1891) A C 316

The fact that the debtor has called a meeting of his creditors and offered a composition is not equi-

What is not notice valent to giving notice, *Re Walsh* (1885) 2 Morr 112 Likewise, a statement by the debtor's solicitor that adjudication will soon be applied for is no notice *Trustees v Rowland* (1886) 2 Q B 124, nor is such solicitor's letter saying that he has received

instructions to issue circular letters to the creditors *Re Morgan*, (1915) 2 Mans 508

Clause (h) The arrest or imprisonment of a debtor in execution of a decree for money is an act of insolvency here under Compare sec 55 of the C P Code This clause just like cl (e) is intended to enable a creditor to procure an act of insolvency or, in other words to compel the debtor to commit an act of insolvency see *Lachmichand v Bepin Behari*, 3 C W N 16

Explanation —An act done by the agent may amount to an act of insolvency on the part of the principal Thus a trader residing out of the jurisdiction of the Calcutta

High Court but carrying on business at Calcutta by a *gomastha* can be adjudicated an insolvent, if the *gomastha* stops payment and leaves his usual place of business or does any act which if done by the trader himself would have rendered him liable to be adjudicated an insolvent *In re Hurruck Chand* 5 Cal, 605 6 C L R 282 This case was dissented from in a subsequent case where it was held that a departure such as is made an act of insolvency is a departure by the debtor personally and cannot be committed by any other person on his behalf such departure must be his departure and the intent to depart must be proved to be his intent Moreover a man cannot commit an act of insolvency by an act of his agent which he has not authorised and of which act he had no cognisance *In re Dhunput Singh* 20 Cal 711 This view accords with the English cases which maintain that an act of insolvency is a personal act or default and cannot be committed through an agent *Ex parte Blain* 12 Ch D 522 *Cooke v Vogeler* (1901) 4 C 102 When the case of *Dhunput Singh* went in appeal before the Privy Council (see *Kastur Chand v Dhanput Singh* 22 I A 162 23 Cal 26 5 M I J 169 P C their Lordships (though affirming the decision of the High Court) pointed out that the principle in the case of 5 Cal 605 rendering a principal liable for the act of his agent was correct under the Statute The view taken by the Privy Council seems to represent the correct law inasmuch as that is the only possible view that can be taken of the explanation appended to sec 6 See also *In re Brij Mohan* 3 C W N 306 where the departure of the *gomastha* from the place of business was held to constitute an act of insolvency on the part of the principal See also *Kalianji v Bank of Madras* 39 Mad 693 9 M I J 188 31 I C 583 and *In re William Watson* 11 Cal 161 8 C W N 553 The primary condition for binding a principal by his agent's actions is that the act of the agent must be within the scope of his agency see 20 Cal 111 affirmed by 2 Cal 16

P C If an *ex partner* cannot plead that he is not a partner he cannot raise any plea such as want of authority which may prejudice a petitioning creditor, *Duarkadas v David Sassoon*, A I R 1930 Sind 83 121 I C 865

Petition

7. [§ 5.] Subject to the conditions specified in this Act, if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Court may on such petition make an order (herein after called an order of adjudication) adjudging him an insolvent

Explanation—The presentation of a petition by the debtor shall be deemed an act of insolvency within the meaning of this section, and on such petition the Court may make an order of adjudication

Review of the Section Sec 6 has mentioned the circumstances under which the debtor is to be taken as having committed acts of insolvency and sec 7 lays down the consequences that will follow from the commission of an act of insolvency. This section provides that when an act of insolvency is committed both the debtor and his creditor can present an insolvency petition and the former can thereupon be adjudged an insolvent. The whole section is subject to the condition specified in this Act some of these conditions have been specified in secs 9, 10, 11, 12 and 13 *infra* so those sections should not be lost sight of. Subject to the conditions specified in the Act all debtors committing acts of insolvency are liable to bankruptcy proceedings. As to the meaning of the term debtor *vide* notes at p 14, ante. Comp the meaning assigned to the term "debtor" in sec 1(2) of the Eng Bankruptcy Act 1914. As to the liability of an alien debtor to bankruptcy proceedings *vide* p 5. Corporations, registered companies and associations are exempt from bankruptcy proceedings see sec 8 *infra*. As to how far minors lunatics and idiots are subject to bankruptcy proceedings *vide* under sec 5 *infra*. A convicted felon can be adjudicated bankrupt *Ex parte Curtis* 10 Ch D 1. As to the bankruptcy of married women see sec 125 of the English Bankruptcy Act, 1914. Comp also *Re Dagnall* (1896) 2

Q B 407, *Re Worsley*, (1901) 1 K B 309, *Re Reynolds*, (1915) 2 K B 186 Also Ringwood, 15th Ed p 7 As to who can be petitioning creditors *vide* under the heading "Creditor that can make a bankruptcy petition," at p 8081, *infra* It should be remembered that certain creditors are precluded from making a bankruptcy petition, namely (1) creditors who are privy to an act of bankruptcy, see pp 54, 61, (2) creditors assenting to a composition deed, see p 82, *infra*, (3) creditors exploiting bankruptcy proceedings with an improper object *vide* under sec 25, *infra*

There is an explanation appended to the section to the effect that the presentation of a petition by the debtor shall be deemed an act of insolvency within the meaning of this section and that on such petition the Court may make an order of adjudication This explanation has been necessitated by the fact that both the creditor's and debtor's right of presenting an insolvency petition has been provided for in the same paragraph Commission of an act of insolvency is a condition *precedent* to the filing of an insolvency application and section 6 (f) makes presentation of such an application an act of insolvency, so it may be contended that prior to an application for insolvency, in the absence of other acts of insolvency, there should be a similar previous application within the meaning of clause (f) of sec 6 To obviate this anomaly and to avoid an idle formality, the explanation is added enabling the same petition to occasion a contingency for the application and to embody a prayer for adjudication Presentation of a fresh petition for insolvency after annulment of a previous adjudication constitutes a fresh act of insolvency entitling the creditor to start bankruptcy proceedings afresh, *Jamaldin v Bishambhardial*, 109 I C 578

The Court may make an order This shows that the order of adjudication (as it is called) is in the discretion of the Court Discretion when applied to law always means discretion guided by judicial principles It must be governed by rule and not by humour It must not be arbitrary vague and fanciful, but legal and regular *Harbuns Sahai v Bhairo Pershad* 5 Cal 259 4 C L R 23, *Hirabhai v Dhanjibhai* 2 Bom L R 845 If the Court considers that the debtor's estate should be administered under the bankruptcy law for the benefit of the creditors It should make an order of adjudication, *Re Pinfold* (1892) 1 Q B 73

The other conditions that a petitioning creditor or debtor has to fulfil will be found in sections 9 and 10 respectively As the whole section is subject to the other provisions of the Act, it must be taken subject to the limitation of those sections.

(sections 9 and 10—formerly sec 6), *Uday Chand v Ram Kumar* 15 CW N 215, 12 CLJ 400, see also *Kali Kumar v Gopi Krishna* 15 CW N 990 12 IC 48 *Chhatrapat Singh v Alarag Singh*, 25 CLJ 215 (PC) at p 218

Under this section the insolvency application filed by the creditor must be directed against the debtor himself. No petition for adjudication lies against the heir of the debtor at the instance of the creditors of the deceased, unless the relation of creditor and debtor has been established between such heir and the creditors, *Re an application by Shivji Dhanji*, 8 SLR

No adjudication of the son for the father's debts 93 25 IC 930. Thus a creditor of a Hindu father, cannot after the death of the father, ask for adjudication of his son for the father's debts. *Naga Subra*

manja Mudeli v Krishnamachariar, 50 Mad 981 AIR 1927 Mad 922 53 MLJ 403 104 IC 642. There is no provision in the Provincial Insolvency Act enabling the creditor of a deceased debtor to file a petition for the administration of his debtor's estate similar to the one contained in sec 108 of the Presidency Towns Insolvency Act, 25 IC 930, 8 SLR 93. But if an insolvency petition is presented against a debtor, and the debtor dies pending the hearing of the petition the same may be continued for the realisation and distribution of the property of the debtor see sec 17, *post*.

Joint petition. Under the English Bankruptcy Act as well as under the Presi Towns Insolvency Act (sec 90) two or more persons being partners or carrying on business in partnership may take proceedings or be proceeded against jointly. Having regard to the provisions of sec 79 (c) as to the adjudication of a firm it seems this will be the law also under this Act, prior to which a contrary view seems to have been maintained. See *Saroda Prasad v Ramsukh*, 2 CLJ 318—followed in *Kali Charan v Harimohan* 31 CLJ 206 24 CWN 461 58 IC 531. But read the observations of Sadasiva Aiyar J in *Bolisetti Mariappa v Kolla Kolayya* 44 Mad 810 40 MLJ 570 63 IC 916 and the notes under sec 15 under the heading "Separate petitions against joint debtors." *Vide* also the Rules Nos 19-22 framed under this Act by the Calcutta High Court. Where the debtor is a firm the insolvency petition must be in the firm name and must be signed and verified in the manner laid down in Rules 19-22 & 24 see *Satish Ch Addy v Firm of Kajnarain Pakhira* 2 IC 60 (Cal). In order to sustain a joint adjudication the alleged act of insolvency must be committed by each of the persons charged with it. Or, in other words, an act of insolvency committed by one debtor will not be available against his co-debtor. *Harish Chandra v East India Coal Co*, 26 CWN 733. Members of a joint family can be adjudged

insolvents only for a joint debt or joint act of insolvency *Paras Ram v Amir Chand*, 10 Lah L J 207 A I R 1928 Lah 354

Concurrent petitions *vide* notes under sec 36, under the heading "Concurrent Proceedings"

No annulment of transfer along with the order of adjudication It is not competent to the Court by the same order adjudicating the debtor an insolvent to order cancellation of sales made by the insolvent immediately prior to the application, *Affireddi v Chinna*, 45 Mad, 189 41 M L J 606 14 L W 639 (1921) M W N 816 A I R 1922 Mad 246 66 I C 271

8. [§ 6 (6)] No insolvency petition shall be presented against any corporation or against any association or company registered under any enactment for the time being in force

Exemption of corporation etc from insolvency proceedings

This section corresponds to Sec 126 of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926 and makes provision for the exemptions of corporations, associations and joint stock companies etc from insolvency proceedings. The whole object of the bankruptcy law is to secure a speedy distribution of the assets of the insolvent among his creditors and to protect the insolvent from their oppressions. As regards the distribution of the assets of the companies there is a special enactment prescribing a special procedure for its winding up. Cf the Indian Companies Act (Act VII of 1913). See Ringwood's Bankruptcy, 15th Ed, p 9. The other object of insolvency law has no application in the case of companies and corporations inasmuch as having no corporeal existence, they are not subject to any physical pressure. It should be noticed that it is only the registered association or company that is excluded by this section, so it seems that an unregistered association or company (which is no better than a mere partnership business) may be subject to insolvency proceedings. The use of the word "against" twice in the section makes it clear that the clause "registered under etc" goes with both the words 'association' and 'company'.

From the specific enumeration of corporations and registered associations and companies as exempt from insolvency proceedings, it seems that all other bodies having either a juristic or an actual existence are liable to be adjudicated insolvents. So it seems that insolvency proceedings can be

Adjudication of firm taken against two or more persons, carrying on business as partners in the name of the firm though this section,

does not clearly say so. In the Presidency towns Insolvency Act (see 99) there is a provision for taking proceedings against partners in the firm name based upon a similar provision in the English Bankruptcy Act (see sec 115 thereof). Absence of a like provision in the Provincial Insolvency Act led to the view that such a proceeding against two or more partners in the name of the firm is not permissible under this Act, *Kalicharan Shaha v Harimohan* 31 C L J 206 24 C W N 461 following 2 C L J 318. But this section seems to be wide enough to permit an insolvency proceeding against a firm. The Legislature too perhaps understood this section in that light when they enacted clause (c) of section 79 (2) which presupposes the possibility of a firm being the debtor. When all the names of the partners are not known it is but natural that the proceedings should be taken against them in the name of the firm but an order of the Court may be made for disclosure of all the names of the partners. A receiving order made against a firm operates as a receiving order against all the partners individually. There can be no adjudication order in gross against the firm in the firm name but there should be separate adjudication for each individual partner. See Halsbury's *Laws of England*, Vol II, p 13 also Rules 19 & 24 of the Calcutta High Court rule xxviii of the Madras High Court and Rules 22 & 27 of the Allahabad High Court also notes under the heading "joint petition" at p 70 ante. That the partners can be adjudicated in the firm name also appears from *Debendra v Purusallam Das*, 55 I C 186 (Cal). In order to support an adjudication of all the partners the debt must be owing by all the partners, *Ex parte Battaris* (1900) 2 Q B 698. A debt owing by one partner only will not support a joint adjudication against him and his co-partners. *Ex parte Clarke* 1 Dec & Ch 544.

Now on a single petition the members of a joint Hindu family may be adjudicated insolvents just like all other joint debtors. Vide notes under the heading "joint petition" at p 70, ante, and those under the heading, "separate petition against joint debtors" at pp 109 10, infra. Cf *Satish Chandra Iddi v Firm of Rajnarain Pakhira*, 72 I C 60. Members of joint family can be adjudged insolvents only for a joint debt or a joint act of insolvency, vide notes under the heading Family Debt at p 76 infra. Joint family members can be adjudged insolvents only for a joint debt or joint act of insolvency. *Taras Ram v Amir Chand* 10 L L J 207 A I R 10 S L J 154.

Minor The Act is silent as to whether a minor can be adjudged an insolvent. Generally speaking any person capable of making binding contracts can be adjudicated an insolvent. But a minor is not competent to make a contract, see *Mohori*

Bibi v Dharmadas, 30 Cal 539 (P C) 7 C W N 441, and *Sarwarjan v Fakiruddin*, 9 Cal 232 (P C) 16 C W N 74 15 C L J 9 (reversing 34 Cal 163 F B 11 C W N 34 4 C L J 41), *Ma Hui v Hoshain Ebrahim*, 32 C L J 214 *Ex parte Sydebotham*, 1 Alk 146 So it has been held that an infant cannot be a 'debtor' and therefore cannot be adjudicated an insolvent under any circumstances *Re Sital Prosad*, 43 Cal 1157 20 C W N 140 *Cf Sankaranarayana Pillai v Rajamani*, 47 Mad 462 46 M L J 314 20 L W 357 A I R 1924 Mad 550 Similarly, it has been held that an infant partner of a firm cannot individually be adjudicated an insolvent, *Sanyasi Charan v Ashutosh Ghose*, 42 Cal 225 26 I C 836, *Janki Parsad v Gridharilal*, 16 O C 68 19 I C 704 In view of the provisions of section 247 of the Contract Act, the adjudication of a minor partner as insolvent is illegal, *Jagmohan v Grish Babu*, 42 All 515 18 A L J 611 58 I C 557, see also *Loell and Christmas v Gilbert Walter Beauchamp*, (1894) A C 607 63 L J Q B 802

A minor may be bound for the debts incurred for the necessities of his life, but it is doubtful whether such a debt for necessities will be sufficient to support a petition of insolvency, *Ex parte Jones*, (1881) 18 Ch D 109, *Cf Re Soltykoff*, (1891) 1 Q B 413 Authoritative opinion seems to be that such debts for necessities do not render the minor liable to insolvency, see Halsbury, Vol II, p 12 and (1894) A C 607 *Cf Re A and M* (1926) 1 Ch 274 An infant who has traded but has made no express representation that he is of full age cannot be adjudicated a bankrupt on the petition of a person who has supplied him with goods on credit for trade purposes, *In re Hansraj Halji*, 7 Bom 411, see also *Ex parte Jones*, (1881) 18 Ch D 109, *In re Nabodeep Chunder Shaha*, 13 Cal 68, *Stevens v Jackson* 4 Camp 164 1 Marsh 469, *Leslie v Shiell*, (1914) 3 K B 607 It seems that where a minor raises a debt on the representation of his adolescence which is acted upon he is capable of committing an act of insolvency, *Ex parte Watson*, 16 Ves 265

Though a minor cannot be adjudicated an insolvent, it is still open to the creditors to make a proper application against

the firm which has a minor as a partner
and the minor's interests in that firm,
Jagmohan v Grish Babu, 42 All 515

18 A L J 611 So, a trading concern carried on for the benefit of adult persons and of a minor can be adjudicated as insolvent in the firm name and the property of such concern can be dealt with in the insolvency proceedings for the benefit of the general body of creditors *Re Hiralal Shri Narayan & Co*, *Shaw Wallace & Co*, *In re* A I R 1927 Sin this view can be maintained only by importing

of sec 247 of the Indian Contract Act and must be taken as circumscribed by the limitations of that section, and in connection with this matter the following cardinal points should be remembered, (1) a minor cannot become a partner by contract, see *Mohari Bibi's* and *Mir Sarwarjan's* cases, *supra*, (2) he can under his personal law, be admitted to the benefits of partnership, but is not personally liable for the obligations of the firm, sec 247, Indian Contract Act, (3) he cannot be one of the group of persons collectively called a firm in sec 239 of the Indian Contract Act, see *Sannyasi Charan v Krishno dhan*, 40 Cal 560 43 M L J 41 26 C W N 054 35 C L J 498 67 I C 124 (P C), (4) unless a proceeding is taken against a family concern invoking sec 247 of the Indian Contract Act, the minor's share therein will not be liable Therefore, where the adult members of a joint Hindu family are adjudicated, the minor members' shares do not vest in the Receiver and cannot be dealt with by him, *Re Radhakrishniah Chetty*, A I R 1924 Mad 291 19 L W 415 84 I C 128 As to

Minor member of a family the liability of the minor members under the Mital shara Law for the joint family obligations see *Sadasiva Mudaliar v Hajee Fakcer* 37 C L J 569 27 C W N 677 44 M L J 396 72 I C 48 (P C) Where a firm includes both adult and minor members, only the adult members should be adjudicated, *Ex parte Henderson*, 4 Ves 863, *Ex parte Layton*, 6 Ves 440, *Ex parte Barwis*, 6 Ves 601, *Lovell and Christmas v Beauchamp*, (1894) A C 607

Lunatic Ordinarily, a lunatic cannot be adjudicated an insolvent, an order of adjudication can, however, be passed against him during a lucid interval, *Crispe v Peritt*, Wills, P 473 see also *Re Farnham* (1895) 2 Ch 799 If it be for the benefit of the lunatic, the committee of the lunatic may file a petition in bankruptcy on his behalf, *In re James*, (1884) 12 Q B D, 332, see also *In re Lee*, 23 Ch D 216 A lunatic may be adjudged an insolvent upon a debt contracted and an act of insolvency committed, by him during a lucid interval, *In re Cohen*, 10 Ch D, 183 Also see Halsbury's *Laws of England*, Vol II, pp 10-11 *Anon*, 13 Ves 500, *Ex parte Stamp* 1 De G 345

Idol A Hindu idol is a juristic entity, a juridical person, *Pramatha Nath v Pradyumna*, 41 C L J 551 30 C W N 25 (P C), *Damodardas v Lakur Das*, 37 Cal 885 14 C W N 89 12 C L J 110 90 M L J 624 7 I C 240 (P C), and is regarded as a perpetual infant Consequently, the principles of bankruptcy law that apply to a minor will necessarily apply to it

9. [§ 6 (4)] (1) A creditor shall not be entitled to present an insolvency petition against a debtor unless—

Conditions on which
creditor may petition

- (a) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors amounts to five hundred rupees, and
- (b) the debt is a liquidated sum payable either immediately or at some certain future time, and
- (c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition

[§ 6 (5)] (2) If the petitioning creditor is a secured creditor he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent or give an estimate of the value of the security. In the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor.

This section lays down the circumstances under which a creditor is entitled to present an insolvency petition against his debtor. It mentions three contingencies all of which have to be fulfilled in order to render the creditor's petition maintainable inasmuch as the three sub-clauses (a) (b) and (c) of clause (1) of this section are linked by the word and and not or which occurs in sec 10 below. Of course mere fulfilment of these three contingencies will not do unless an act of insolvency is first committed by the debtor within the meaning of sections 6 and 7 above. Where on a creditor's petition the debtor himself gives evidence saying that he is unable to pay the debts the situation is as if he himself is the petitioner and the alleged act of insolvency need not be closely scrutinised. *Periya Karuppan Chettiar v Angappa Chettiar* 21 L W 57 AIR 1925 Mad 483 86 I C 2.

Sub-sec. (1) : Conditions of Creditor's Petition :—
The three conditions contemplated in this section are —

(a) the total amount of debt due to the petitioning creditor or creditors must be Rs 500 or upwards, and

(b) the debt must be a liquidated sum payable immediately or at a future date, and

(c) The petition must be presented within three months of the commission of the act of insolvency

Aggregate amount Although the amount of debt due to each individual creditor be less than Rs 500/-, still the requirements of the section will be fulfilled if the aggregate amount of the debts owing to the petitioning creditors comes up to Rs 500/. If this statutory amount is not reached, a creditor's application will be incompetent, but the deficit may be made up by joining one or more creditors as petitioners. But the date of institution of the insolvency petition will be the date on which the requirements as to the aggregate amount are complied with and not the date of the presentation of the original petition, *Sohan Lal v Sheonath*, 26 A L J 941 A I R 1928 All 676 111 I C 136 It seems that if the statutory amount is under reached when the amount of an unaccepted valid tender is taken into account (i e deducted), a bankruptcy petition cannot be maintained *In re Lawrance*, (1928) 1 Ch 665

Court's duty on Creditor's application On an application by the creditor for the debtor's adjudication as insolvent it is the duty of the Court to enquire whether the amount of debt due to the petitioning creditor is Rs 500 or more, and also generally to follow the procedure laid down in sec 24, *Nathoo v Ghulam Dastgir* A I R 1926 Lah, 638 (2) 96 I C 424 If the debtor denies owing anything to the petitioning creditor, the Insolvency Court can determine the controversy, *Nur Mohammad v Lal Chand*, 7 Lah L J 201 "When an act of insolvency is alleged the learned Judge must first satisfy himself whether the creditor is a creditor for the amount alleged or for a sufficient amount to justify a petition under the Act, or in other words that the creditor has a right to present the petition," *Tara Chand v Jugal Kishore* 46 All, 713 22 A L J 684 83 I C 967 It is not necessary in the case of a creditor, as it is in the case of a debtor to prove that the debtor is unable to pay his debts, *Jamal Din v Bishambar Dial* A I R 1929 Lah 72 109 I C 578

Family Debt There is nothing in this Act to prevent the undivided members of a joint Hindu family from being adjudicated insolvents in respect of debts due by the family, *Muthu Veeerappa v Sitagurunatha*, 49 Mad, 217, and it has

been held that the members of a joint family can be adjudged insolvents only for a joint debt, *Paras Ram v Amir Chand*, 10 Lah LJ 207 AIR 1928 Lah 354 109 IC 464, consequently, where a joint Hindu family consists of father and two sons, the debt incurred by one of the sons cannot be made the basis of adjudication of the father and the other son as insolvents, unless it is shown that the debt was incurred for a family purpose, *ibid*

Debt The debt must be owing by the debtor in his own right and not as an executor or otherwise, *Pattison v Banks*, Cooper, 540 In order to make a person liable to be declared an insolvent it is sufficient if he is personally liable for the debts though the decrees obtained by the creditors do not make him so liable, *Soma Sundaram Chettiar v Kanoo Chettiar* (1929) MW N 262 AIR 1929 Mad 573 118 IC 494 The relation of creditor and debtor exists between the lender and the members of a joint Hindu family in respect of the family debt, therefore any member can be adjudicated on account of such debt as if it were his own, *Muthu Veerappa v Sriraguruna* 49 Mad, 217 AIR 1926 Mad, 133 22 LW 617 49 MLJ 697 92 IC 603 Cf 10 Lah LJ 207, *supra* According to English cases, the debt must continue to exist up to the date of the order of adjudication, see *Ex parte Mathea*, (1884) 12 QBD 506 1 Morr 47 But the present Act does not say that the petitioning creditors in order to maintain an insolvency petition should continue to be creditors up to the time of the order of adjudication It is sufficient if they are creditors at the time the petition is filed *Venkatarama v Buran Sheriff*, (1926) MW N 946 99 IC 536 (*infra*) A creditor is not entitled to present a bankruptcy petition against the debtor unless the debt due to him by the debtor was a liquidated sum at the date of the act of bankruptcy The fact that the debt became a liquidated amount at the date of the presentation of the petition will not enable him to present the petition, if it was unliquidated at the date of the act of bankruptcy *In re Debtors* (192) 1 Ch 19 (CA) 96 LJ Ch 33 The debt must be a real one and the Court can always enter into a question regarding its nature *In re Onslow* 10 Ch D 373 *In re Lennox* 16 QBD 315 The fact that a suit has been commenced to recover the debt is no bar to a petition for adjudication being based on the debt *Inanta Kumar v Sadhu Charan*, AIR 1926 Cal 234 8 IC 751 nor is the realisation of rent by the creditor landlord from the under tenant of the bankrupt any such bar so long as the landlord's dues exceed Rs 500/ Comp *In re a Debtor* (1900) 1 Ch 170 98 LJ Ch 35 A decree for rent is such a debt as can sustain a bankruptcy petition see *Munna Singh v Digvijai*, 10 ALJ 273 60 IC 758 Statutory interest and costs on

a judgment debt become a part of the debt, *Re Leh Mann*, (1890) 7 Morr 181. But the costs of an abortive execution cannot be added to make the statutory figure of Rs 500, *Re Long*, 20 Q B D 316, *Cf Re Whelan*, 48 L J Bk 43. If the debtor denies owing anything to the petitioning creditor, the Insolvency Court can decide the dispute, *Nur Mahammad v Lal Chand*, 7 Lah L J 201 A I R 1925 Lah 436 90 I C 254. Vide also under the heading "Creditor that can &c" at p 80.

Interest and Costs : are parts of debts and can be taken into account to reach the statutory limit of Rs 500/- *Cf Re Leh Mann supra*

Two or more This shows that any number of creditors may join to make a petition against a debtor. Persons jointly interested in a debt (such as members of a Hindu joint family) may be parties for the purposes of Insolvency proceedings, *Ex parte Ragazaloo Chetti*, 15 Mad , 356

Liquidated sum The debt which can sustain a bankruptcy petition is a *liquidated sum payable either immediately or at some certain future time*. The amount of debt must be a definite and ascertained sum, so that the Court may not have to assess it. A claim for mesne profits or for damages based on tort or breach of contract is an instance of an unliquidated debt. Thus a creditor's claim for damages for breach of contract will not entitle him to present an insolvency petition, but such a claim is provable under sec 34 (1) of this Act, *Re Miller*, (1901) 1 K B 51. For other instances of liquidated sums, see *Ex parte Broadhurst* 22 L H Bank 2, *Johnson v Diamond*, 24 L J Ex 217, *Re Dholan Das*, 13 S L R 187 56 I C 158, *Holfe v Barr* (1896) 1 Q B 616, *Rangasamy Mudaliar, v Srinivasa* [1910] M W N 731, *Juggomohun v Manichend*, 4 Ch W R 8 (P C), *Page v Newman*, 109 Eng Rep 140 *Cf Banarsi Das v Baldeo Das*, A I R 1925 Oudh, 222 82 I C 742. The amount must be ascertained and must be shown to be undisputably due. So, a claim for not giving re delivery of shares lent by one person to another is not a *debt*, or sum of money due or claimed to be due, *Owen v Ruth*, (1854) 23 L J C P 105. To constitute a good petitioning creditor's debt, there must be a certain sum certainly due and payable to the said creditor, *Ex parte Muirhead*, (1876) 2 Ch D 22, *In re Sacker*, (1888) 22 Q B D 179, 186. The expression "some certain future time" means any time in the future which is capable of being ascertained *Venkatarama v Buran Sheriff*, 50 Mad 396 51 M L J 680 (1926) M W N 946 24 L W 858 A I R 1927 Mad 153 99 I C 536. Money due on a bill of exchange duly accepted is a liquidated amount, and the drawer of the bill remains a surety in spite of its dishonour, *Chetandas v Ralli Bros*,

Bill of Exchange

AIR 1925 Sind, 153 83 IC 135, and can after payment in respect of it maintain an action on it and also petition for adjudication of the acceptor, *Ibid* Cf *Indian Specie Bank Ltd v Nagindas*, 18 Bom LR 689 35 IC 628 A petition based upon a debt for which the debtor had accepted a bill of exchange, which in pursuance of an agreement to that effect had

been renewed although the second bill had not become due at the date of the presentation, is maintainable, *Re Barr*, (1896) 1 QB 616 If a creditor seeks

to press his claim as a liquidated sum and grounds his insolvency petition thereon, he will thereafter be precluded from maintaining a suit upon such claim Thus, a person who had lent a ring to another presented an insolvency petition to have that other adjudged an insolvent, and proved in insolvency a debt based on the value of the ring which, since the filing of insolvency petition, was pledged by the insolvent to a third party The lender of the ring failed to get anything for his debt in the insolvency proceedings, and then brought a suit against the pledgee for return of the ring or its value, *held* in treating the value of the ring as a *liquidated debt* for the purposes of the insolvency proceedings the plaintiff had already *elected* to abandon all rights to the ring and as such the action was not maintainable and that the pledgee had obtained a good title on the principle of estoppel feeding the title *Sinnam Chetty v Alagiri Aiyar* 46 Mad 852 45 MLJ 516 18 LW 545 (1924) 11 WN 6 (FB)

Three months The creditor must present his petition within three months of the commission of an act of insolvency complained of So, if a notice of suspension of payment is given within 3 months of the insolvency petition, the debtor can be adjudicated on that act of insolvency, *Banarsi Das v Baldeo Das*, AIR 1925 Oudh 222 82 IC 742 Cf *Ghulam Mahomed v Panna Ram*, AIR 1924 Lah 374 72 IC 433 A petition of insolvency presented more than three months after the date of the act of insolvency on which it is grounded is incompetent hereunder, *Ajajaparaju v Venkata Krishnayya*, *infra* Thus in a case the transfer by the debtor of his property in favour of his minor son (which constituted the act of bankruptcy) took place more than three months before the presentation of the petition and in consequence the creditor's petition was dismissed, *Nur Mahomed v Lal Chand* 7 Lah LJ 201 AIR 1925 Lah 436 90 IC 254 The period of three months should be reckoned according to the British Calendar, see sec 3 (33) of the General Clauses Act, (Act X of 1897) If an act of insolvency is committed on Aug 13, a petition, presented on Nov 13 following is in time, *Re Hanson*, (1887) 4 Morr 98 35 WR 456 56 LT 573 If the period termi-

nates within holidays (*i.e. dies non*) it can be extended up to the re opening day, under sec 10 of the said Act and not under the Limitation Act, because sec 78 (1) of this Act has rendered only secs 5 and 12 of the Indian Limitation Act applicable to insolvency matters, so under sec 29 of the Limitation Act, the other provisions of the said Act will not apply to insolvency petitions, see *Kalimuddin Mollah v Sahiluddin*, 30 C L J, 455 24 C W N 4, F B See also *Chavadi Ramasami v Venkateswara*, 42 Mad, 13 35 M L J 531 48 I C 952 So it has been held that sec 14 of the Limitation Act does not apply to insolvency proceedings Therefore, where a proceeding is started in a wrong Court, the period during which the proceeding remains pending in the wrong Court, cannot be excluded in computing limitation, *Trasidera v Paramesh*, 39 Mad 74 27 I C 144 29 M L J, 451 See also 44 M L J 303, *infra* In this connection see the case of *Bulomal v Soomar Khan* cited under sec 78, *infra*, under the heading "The Section ' Subject to the aforesaid rule about three months, there is no limitation for filing an insolvency application, *Alagappa v Saradambal* 25 Mad, 724 If the application be filed within three months but if it be not in form by reason of absence of necessary deposit under Rule 27 (4) of the Bombay High Court (framed under this Act) or so forth, time may be granted to the applicant to put his application in form by supplying the omission *Chhotubhai v Dhajibhai* 26 Bom L R 432 A I R 1924 Bom 472 80 I C 432 Under the old Act of 1907 this duration of three months could not be enlarged by the application of sec 5 of the Limitation Act, inasmuch as that section did not apply to the said Act, *Aiyaparyulu v Venkata Krishnaya* (1923) M W N 195 44 M L J 303 72 I C 488 [N B In this case the delay was due to presentation in a wrong Court] But under the new Act the law is different *vide* sec 78 *post* In computing time the day on which the petition is presented is excluded, *Re Hanson*, *supra* Formal defects in a petition already filed in time may be rectified by way of amendment after the period of 3 months, *Re Debtor*, (1902) 86 L T 688

Creditor that can make a bankruptcy petition See Definition of creditor sec 2 (1) (a) Generally speaking one who is entitled to immediate payment and is capable of giving a valid discharge can maintain an insolvency petition as a creditor, but under certain cases even a creditor who could not demand immediate payment can file an insolvency petition against his debtor, *Ex parte Raatz* (1897) 2 Q B 80 It is not necessary that the petitioning creditor should be a creditor at the time the order of adjudication is passed, it is sufficient that he was a creditor at the time

of filing the petition, *Venkatarama v Buran Sheriff*, 50 Mad 396 51 M L J 680 (1926) M W N 946 24 L W 858 A I R 1927 Mad 153 99 I C 536, and when the act of insolvency was committed, *Muthua Chettiar v Lakshminarasa*, 13 L W 141 61 I C 756 The mere fact of postponing the payment of a decree debt till the disposal of a connected suit does not have the effect of rendering the decree holder incompetent to petition for the adjudication of the debtor as insolvent, *Ibid* An undischarged insolvent can present a bankruptcy petition in respect of debts due to him which his trustee either does not or cannot claim, e g salaries due to him, *Kitson v Harduick* (1872) L R 7 Ch Pr 473 When a petition is put in by the creditor to

adjudge his debtor an insolvent, the Court to enquire into the amount of debt creditor can prove the amount of his debt in the insolvency proceeding and for that purpose no separate suit is necessary *A K Chetty v Maung Alung*, 1 Bur L J 239 68 I C 885 A I R 1923 Rang 21 If there be any controversy as to the amount of such debt the Insolvency Court can judicially determine the question *Nur Mohammad v Lal Chand*, 7 Lah L J 201 A I R 1925 Lah 436 90 I C 254—distinguishing 181 P R 1883 See also *Nathoo v Ghulam Dastgir* A I R 1926 Lah 638 96 I C 424 Nay it is the duty of the Court to hold an enquiry into the existence of the debt and adjudicate upon it *Hulam Chand v Gangaram* A I R 1927 Lah 111 99 I C 666 An infant or a lunatic is entitled to enforce the payment of a debt due to him by means of bankruptcy proceedings, *Ex parte Brocklebank*, (1877) 6 Ch D 358 Cf (1884) 12 Q B D 332 The mere fact that a man has only one or a solitary creditor is not a sufficient ground for saying that bankruptcy proceedings cannot be maintained against him, *Re Hecquard*, 24 Q B D 71 A corporation or a company may be petitioning creditor *Ex parte Dan Rylands* (1891) 64 L T 742 Cf *Re Winter Bottom*, (1886), 18 Q B D 446 A bare trustee can be a petitioning creditor but the beneficiary if not under any disability must join him *Ex parte Culley* (1879) 9 Ch D 307 Cf (1884) 14 Q B D 184 One of several executors may present a petition in respect of a debt jointly due to them *Ex parte Brown* (1832) 1 Deac & Ch 118 One of several joint creditors may alone make the petition *Brickland v Newsome* (1808) 1 Camp 474 2 Mont & A , 283 but, see under the heading "joint creditor" below also 2 Rang 309 When a company is the petitioning creditor, the provisions of Orders XXX and XXX of the C P Code must be complied with in the matter of signing and verifying the petition Cf *Bolisetti v Kolla Kottappa*, 44 Mad , 810 , *Satish Ch Addy v Firm of Rajnarain Pakhira*, 72 I C 60 (Cal) If the company is under liquidation the liquidator must figure in the proceeding, *Re Winter*

Bottom, supra One partner can sign a bankruptcy petition on behalf of himself and his co partners even where the firm has already been dissolved *Re Hill*, (1921) 2 K B 831, cf 44 Mad 810, *supra* An alien or denizen can be a petitioning creditor whenever he can sue for the debt, *Ex parte Pascal*, (1876) 1 Ch D 509, an alien enemy cannot, therefore, do so, see Lindley p 745 For the purposes of this section a creditor cannot take advantage of an act of insolvency committed before he became a creditor, *Muthua Chettiar v Lakshminarasa Aiyar*, 13 L W 141 61 IC 756 A creditor who was a consenting party to a deed of arrangement executed by the debtor for the benefit of all the creditors is not entitled to file an insolvency petition against the debtor

Cred tor assenting to composition

relying on the said arrangement as an act of bankruptcy, *Rukmani Ammal v Rajagopala Aiyangar*, 48 Mad, 294 47 M L J 495 (1924) M W N 813 20 L W 681 84 IC 281 A I R 1924 Mad 839 *Khelamal v Chuni Mal* 2 All 173 (180) See also *Re a Debtor* 94 L J Ch 42 Vide notes at pp 54, 61, ante An assent by a creditor prevents him from relying on an act of bankruptcy only when it is obtained without fraud or misrepresentation *Re Tannenbergh*, 6 Mor 49—cited at p 61 ante Notice the difference between this section and sec 4 (1) of the Eng Statute and read the observations of Ramesam J in 48 Mad 294, *supra*

Application in the Insolvency Court is not the creditor's only remedy He may take Letters of Administration although the liabilities of the deceased debtor appear to be in excess of his assets It is discretionary

Bankruptcy petition—not the creditor's only remedy

with the Court to administer the estate in its Testamentary and Intestate jurisdiction or in its Insolvency Jurisdiction, *In the goods of Makhan Chatterji* 15 C W N 350

Joint Creditor Where a creditor is not the only person entitled to the benefit of a particular debt on the basis of which adjudication is sought but is only *jointly* interested in it along with other creditors his petition for the adjudication of the debtor is not maintainable *Ananta Kumar v Sadhu Charan*, A I R 1926 Cal 234 87 IC 751 Under the English law also one of two joint obligees under a bond is not by himself a good petitioning creditor *Brickbond v Neusome*, (1835) 2 Mont & A 383 But when one of three joint creditors has died a petition may be presented by two survivors, *Re W Tucker*, (1895) 2 Mans 358

Act of insolvency to be specifically alleged It is necessary for a creditor to *specifically* state in his petition the act of insolvency alleged to have been committed by the debtor

It is not sufficient to make some vague allegations and then to endeavour to render them definite by means of evidence. See *Mut u v Angappa*, 28 Bom L R 680 A I R 1926 Bom 383. The commission of an act of insolvency by the debtor is a condition precedent to the maintainability of a creditor's petition for adjudication of the debtor as an insolvent. *Iccragia Chetty v Doraiswami* A I R 1928 Mad 393, 110 I C 737. If an act of insolvency is not set out in the petition the petition is incompetent. It is not correct for a creditor to make various allegations of acts which are not acts of insolvency and then endeavour to prove by evidence that as a matter of fact an act of insolvency has been committed. Cf *Lassanyi v Mulji* 50 Bom 624, 28 Bom L R 6. A I R 1906 Bom 405, 96 I C 435. An order of adjudication based on an act of insolvency which is not relied upon in the application to adjudicate the person as insolvent is illegal. *Kondappa v Pullappa* A I R 1929 Mad 910, 119 I C 26.

Clause (2) For the definition of a secured creditor see sec 2 (1) (c) *ante*. This clause simply lays down that a secured creditor can present an insolvency petition in two cases only (a) When he relinquishes his security *in toto* for the benefit of the general body of creditors or (b) when he becomes practically an unsecured creditor in respect of that portion of his debt which is in excess over the value of his security. In either of these cases he virtually ranks with the unsecured creditors in respect of his debt or a part thereof. The benefit of section 9 does not extend to the secured portion (whole or part) of his debt. When he thus comes to rank with the unsecured creditors he becomes subject to the conditions of clause (1) of sec 9, that is the part of the debt in respect of which he becomes entitled to present the insolvency petition should by itself or together with other creditors' debts reach the statutory limit of Rs 500. When a secured creditor for the purposes of this section values his security at a particular figure he cannot subsequently amend it for the purposes of proof. *Re Button* (1905) 1 K B 602. But see *Landerlinden Ex parte* 51 L J Ch 60, 20 Ch D 289. The secured creditor must adhere to his valuation and must not depart a whit from it. *Comp* (1884) 13 Q B D 128 (130) (1899) 2 Q B D 549. Where a creditor's petition omitted to mention a security but the omission was through inadvertence the petition even after the making of a receiving order may be amended so as to include the security. *Re Debtor* 91 I J Ch 41 (1921) 2 K B 100. For further provisions with respect to secured creditors see sec 4th *post*. Cf sec 6 (2) of the Bankruptcy Act 1888.

The circumstances under which a creditor's application is liable to be dismissed have been mentioned in sec 5 (1) and

if the Court does not dismiss the petition in accordance therewith it shall make an order of adjudication, see sec 27 (1), *post*

10. [§ 6] (3)] (1) A debtor shall not be entitled to present an insolvency petition, unless *he is unable to pay his debts and—*

Conditions on which
debtor may petition

(a) his debts amount to five hundred rupees,
or

(b) *he is under arrest or imprisonment in execution of the decree of any Court for the payment of money, or*

(c) an order of attachment in execution of such a decree has been made, and is subsisting, against his property

[New] (2) A debtor in respect of whom an order of adjudication *whether made under the Presidency towns Insolvency Act, 1909, or under this Act** has been annulled, owing to his failure to apply, or to prosecute an application for his discharge, shall not be entitled to present an insolvency petition without the leave of the Court by which the order of adjudication was annulled. Such Court shall not grant leave unless it is satisfied either that the debtor was prevented by any reasonable cause from presenting or prosecuting his application, as the case may be, or that the petition is founded on facts substantially different from those contained in the petition on which the order of adjudication was made.

Effect of Amendment of 1927 For the amendment introduced by Act XI of 1927, *vide* the Footnotes. The effect of this amendment is that now leave of the Court annulling the adjudication will be necessary *even* when the annulment was under the Presidency towns Insolvency Act. This amendment brings sec 10 (2) of the Act into a line with sec 14 (2) of the Presidency towns Insolvency Act.

* The words in italics have been substituted for the words 'made under this Act' by the Insolvency (Amendment) Act XI of 1927, which received the assent of the Governor-General on the 2nd September, 1927.

Defects in the Act of 1907. *Vide* Cl 3 of the Statement of Objects and Reasons, Bill No 14 of 1918 and Sir George Lowndes's speech, para 2

Change of law [Old sec 6 (3)] The following changes have been introduced in this new enactment—(i) The clause "he is unable to pay his debts" has been added, (ii) In sub-clause (b) the words "he is under arrest or imprisonment" have been substituted for the words "he has been arrested or imprisoned" occurring in the old section, (iii) Clause (2) is entirely new. As to the amendment of 1927, *vide* the *Footnotes*

Conditions of an insolvency petition A debtor can make an insolvency petition if *he is unable to pay* his debts, and if any of the three following contingencies is fulfilled—(a) his debts amount to Rs 500, (b) he is under arrest or imprisonment in execution of a money decree, (c) If there is a subsisting order of attachment against his property in execution of such a decree. Cf *Goshain Gobind v Kishun Lal*, AIR 1924 Pat 166 69 IC 622. Note that the three sub-clauses are linked by the word "or" and not "and" as in sec 9. Therefore the three contingencies are to be taken in the alternative, so that if any of them happens, the debtor becomes entitled to present an insolvency petition, *Samiruddin v Kadumoyi* 12 CLJ 445 (451) SC 15 CWN, 244. But if the Court upon investigation is not satisfied as to the existence of these conditions, it will be entitled to reject the insolvency application, 69 IC 622 (*supra*), *Laxmi Bank Ltd v Ramchandra* 46 Bom, 757 (*infra*). Once the insolvency petition is filed the debtor will not be put out of Court by the mere fact that the execution proceedings that brought him to Court have terminated before his petition is heard, *Kishen Lal v Pirbhu Lal*, (1886) A WN 137.

Inability to pay being a condition precedent to the maintainability of a bankruptcy application it necessarily follows that where a debtor is shown to have been able to pay his debts, his case comes within the meaning of the words "ought not to have been adjudged insolvent" in sec 35 so as to render the adjudication liable to be annulled under the said section. *Ilamelumangathayar Ammal v Balusami* (1928) MW N 62 AIR 1928 Mad 394 108 IC 208.

The insolvency petition should also be a *bona fide* one, and it must not amount to an abuse of the processes of Court, *Ponnusami v Narasimma* 25 MLJ 545, *Triloki Nath v Badri Das*, 36 All, 250 FB, *Malchand v Gopal Chandra* 44 Cal, 899. Where the insolvent is in the habit of borrowing and makes use of the bankruptcy law as a trick against his creditors the Court will reject his petition as an abuse of the processes of Court, *Re Betts Ex parte Official Receiver*, (1901)

2 K B 39 But a *bona fide* petition to free oneself from the pressure of the creditors will not be so condemned, *Re Painter*, (1895), 1 Q B 85, *Re Hancock*, (1904) 1 K B 585

Under the Act of 1907 it was held in some of the cases that where the requirements of secs 5 and 6 (present secs 7, 9, 10, 11 and 12) of the Act have been complied with, an order of adjudication should follow almost as a matter of course, see *Uday Chand v Ram Kumar*, 12 C L J 400 15 C W N 213, and whether the debtor has committed acts of bad faith is to be determined at the time of discharge and not at the time of adjudication, *Mohiruddin v Secretary*, 57 IC 977 (Cal) Similarly, the question of fraudulent concealment of assets should be gone into only at a subsequent stage, *Ganesh Lal v Duarka Ram*, 27 P L R 734 A I R 1927 Lah 27 98 IC 900 When the petition is otherwise within the provisions of the Act, the petitioner cannot be refused an order of adjudication on the ground that he is a dishonest man, *Chirunji Lal v Ajodhi Prosad*, 37 IC 391 Failure to keep or to produce account books entails no disqualification for the purpose of adjudication, *Ganesh Lal v Duarka Ram*, (*supra*) The Act in fact entitled the insolvent to claim an adjudication order as a matter of statutory right when its conditions were fulfilled, and it was not in the discretion of the Court to refuse the same to him, *Chhatrapat Singh v Kharag Singh*, 44 Cal, 535 25 C L J 215 21 C W N 497, 39 IC 788 15 A L J 87 32 M L J, 1 (P C), also see *Triloki Nath v Badri das*, 16 All, 250 12 A L J 355 23 IC 4, *Jagan Nath v Ganga Dat*, 41 All, 486, *Mohiruddin v Secretary*, H G R Samity 57 IC 977, *Keramat Ali v Baidya Nath*, A I R 1926 Cal 955 95 IC 297 Under the present Act also if the conditions specified in this section are fulfilled, an order of adjudication should be made, Cf *Goshain Gobind v Kshun Lal*, A I R 1924 Pat 166 69 IC 622 There is no material difference between the old and the new Acts as to what has to be proved in order to entitle the insolvent to present his insolvency petition, *Laxmi Bank Ltd v Ramchandra*, 46 Bom, 757 24 Bom L R 292 A I R 1922 Bom, 80 67 IC 238, *Re Gopaldas Aurora* 30 C W N 173 A I R 1926 Cal 610 94 IC 793 Where a debtor's petition alleges facts entitling him to present his insolvency petition, the Court should judicially determine the matters referred to in sec 25 one way or the other and either adjudicate the petitioner or dismiss the petition, *Laksmi Narain v Krishen Lal*, 40 All 665 16 A L J 703 47 IC 733 Cf *Daulat v Saheb Lal*, 6 N I R 145 8 IC 1115 It should however never be forgotten that notwithstanding proof of the existence of the conditions mentioned in the statute the Court is not bound to pass an order of adjudication where the application constitutes an abuse of

the processes of the Court, and that it is always the duty of the Court to have regard to this aspect of the matter when the question is raised, *Malchand v Gopal*, 44 Cal, 899 25 C L J 83 21 C W N 298

Unable to pay his debts This clause is new The Act of 1907 did not make the debtor's inability to pay his debts a condition precedent to an adjudication order in his favour That Act simply provided that (i) an insolvency petition by the debtor should contain a statement that the debtor is unable to pay his debts—old sec 11 (1) [new sec 13], and (ii) in the case of a petition by the creditor it was liable to be dismissed on proof of the debtor's *ability to pay* his debts In fact all that the repealed Act required was *profession* of inability and not *proof* of inability So it has been maintained in a Calcutta case by Jenkins CJ that a debtor's application for insolvency cannot be dismissed on the ground that he could not satisfy the judge that he was unable to pay his debts, *Kali Kumar v Gopi Krishna*, 15 C W N 990 12 I C 48 See also *Juala Nath v Parbati Bibi*, 14 Cal, 691 *Mehr Singh v Damanand College*, 44 I C 830 27 P R 1918, *Bidhata Din v Jagan Nath*, 9 A L J 699 The reason for this change has thus been given by the Select Committee—"While admitting that the object of an insolvency law is to deal with all insolvents, whether honest or not, and that no applicant who is in fact insolvent should be liable to have his petition dismissed *in limine* it seems reasonable that the Court should have discretion as to the amount of protection to be afforded to a petitioning debtor in each individual case, the debtor being required to show that he is *in fact unable to pay his debts* and that he has not concealed his property" (Statement of Objects and Reasons) The expression "unable to pay," in this section must have the same meaning as it has in sec 13 (old sec 11) The expression must necessarily mean that the debtor has less realisable assets than the amount of his debts *Ponnusami Chetty v Narasimma*, 25 M L J 515 So when the petition for insolvency itself shows that the insolvent's assets greatly exceed his liabilities he will not be entitled to an adjudication (*Ibid*) If the insolvent has on his own showing a marketable property of an infinitely greater value than his outstanding debts, the Court can dismiss his petition *Dad Khan v Chandu Ram*, A I R 1925 Lah 630 89 I C 585 Under this section, the petitioner has to prove only that he is unable to pay his debts, not that he will never be able to pay his debts The possibility of the insolvent succeeding to a rich father and one day being able to pay will be no ground for rejecting his application, *Gulam Haider v Durga Das*, A I R 1927 Lah 136 99 I C 7 The fact that the insolvent's father is a rich man or that his father allows

him to cultivate certain lands is not sufficient to show that he can pay the debts alleged due by him, *Thakar Singh v Hardit Singh*, AIR 1928 Lah 237 (1) 106 IC 574 (1) A co parcener's interest in the joint family property is *assets* and may be taken into consideration for determining the question of ability to pay, *Bhagirathi Lal v Kanwal Narain* 30 P L R 698 11 Lah L J 480 122 IC 237 Where the inability to pay is alleged to be due to the inalienability of the occupancy right held by the debtor, he has to show that he is not really allowed by the landlord to alienate the occupancy right *Barlat Ali v Guranditta* 27 Punj L R 422 99 IC 997 In valuing the assets of the applicant the Court must exclude such property as is not saleable under the law *Gopal Prasad v Bhunesuar* AIR 1928 Nag 226 108 IC 433 It has however been held that the fact that the debtor's power of alienation is in certain respects restricted by statute is a wholly immaterial circumstance in considering the debtor's inability to pay his debts *Motiram v Kewal Ram*, 9 Lah L J 550 (*infra*) So land belonging to a debtor cannot be excluded in considering whether he is able to pay his debts, merely because he is an agriculturist and his power to alienate land is in certain respects restricted by statute, *Kashmira Singh v Badardin* AIR 1929 Lah 573 120 IC 173 That is to say, in considering the question of *ability to pay* a property though inalienable may be taken into consideration as a realisable asset *ibid* At any rate mere possession of occupancy right will not make the debtor unable to pay his debts unless it is shown that he unsuccessfully applied to the landlord for his consent to an intended transfer of the occupancy right *Jai Singh v Farid Baksh* 30 Punj L R 15 AIR 1929 Lah 397 115 IC 423 This section should not be so strictly construed as to provide a means of defeating the provisions of the Punjab Alienation of Land Act, or where a sale of the whole of a debtor's land would be necessary to provide sufficient money to pay his debts to debar him from seeking the protection of the Insolvency Court *Dad Khan v Chandu Ram supra* Where the debtor is *prima facie* unable to pay his debts his application should not be rejected merely because upon a nice calculation of the value of his assets it might be possible to hold that the value of the assets exceeds the amount of his liabilities *Mul Singh v Ram Singh* 6 L L J 306 AIR 1924 Lah 224 89 IC 375 *Firm of Anur Chand v Bhai Singh* 10 Lah L J 493 AIR 1929 Lah 49 114 IC 54 Where all the properties of a debtor are under attachment and thereof, an apparent surplus of his assets over his gross debts indicated by arithmetical calculation will not establish his *ability to pay* *Lakshminarayan v Subramanaya infra* or in other

words the mere fact of the value of the assets being in excess over the liabilities is no proof of *ability to pay*, if such assets, after realisation, do not bid fair to cover all the debts, *Firm of Moti Ram v Firm of Kadal Ram*, 9 Lah L J 550 AIR 1928 Lah 202 105 IC 569 The Court should not infer 'ability to pay' from the mere fact that the disposal of his property by the debtor was only with a view to defraud his creditor, *Laxmi Bank Ltd v Ramchandra* 46 Bom 757 24 Bom L R 292 AIR 1922 Bom 80 67 IC 238 The expression 'unable to pay' also occurs in sec 54 In that section such inability may result from temporary causes, such as immediate non availability of the money Cf 14 Cal, 691 From the above cases it is apparent that there is no unanimity of judicial opinion as to whether the section contemplates *immediate* inability arising from temporary causes such as the money being locked up for the time being It is well nigh impossible to enunciate a definite principle in this matter and every case must be decided on its peculiar circumstances The following observations may furnish a sensible guide in this direction It is quite an error to suppose that the man is not entitled to be declared insolvent because the sum total of his assets is larger than the sum total of his debts It may well be and is frequently the case that a man's securities are locked up and are not available at the time he is called upon to pay his debts but he is none the less entitled to be declared insolvent unless he is found guilty of dishonest conduct The practice of leaving a man to the mercy of his creditors who with a view to extracting money from him gets him locked up in jail after he has voluntarily placed the whole of his property at the disposal of his creditors is in my judgment a practice which cannot be too strongly reprehended *Satish Chandra Addy v Firm of Rajnarain Pakhira* 72 IC 60 (Cal) Where the applicant had transferred his property to his wife and was possessed of no property excepting in his capacity as trustee of certain *thalurduwara* a *prima facie* case of *inability to pay* has been made out *Hinga Lal v Jawahir Prasad* 5 O W N 964 114 IC 126 A father cannot be adjudicated an insolvent for *inability to pay* his son's debts not shown to have been incurred for a family purpose *Paras Ram v Amur Chand* 10 L L J 207 AIR 1928 Lah 354 109 IC 464

In order to prove the debtor's inability in a case started by him *strict* proof is not necessary

I proof of inability to pay only such proof is to be given as will satisfy the Court that there are *prima*

facie grounds for believing the same see *proviso* to sec 24 *post* Where it appears to the Court *prima facie* that the debtor is not able to pay his debts and his liabilities exceed his assets an order of adjudication

be made *Mul Singh v Ram Singh*, 6 L L J 306 AIR 1924 Lah 724 89 IC 325 The Court is not required to make a detailed and lengthy enquiry into the alleged inability of the applicant to pay his debts, *Firm of Moti Ram v Firm of Kacal Ram*, 9 Lah L J 550 AIR 1928 Lah 202 105 IC 569 Cf *Ganesh Lal v Dwarka Ram*, AIR 1927 Lah 27 98 IC 900, *Rasul Baksh v Gulab Bai*, 4 Luck 52 AIR 1929 Oudh 371 113 IC 20 It is only *prima facie* proof that is necessary to establish such inability, *Lakshmi Narayan v Subramania Iyer*, 45 M L J 129 (1923) M W N 328 AIR 1923 Mad 585 73 IC 74 The mere statement of the insolvent that his liabilities exceed his assets is some evidence of his inability to meet his liabilities, *Racharla Narayanappa v Kondigi Breenappa*, 24 L W 219 AIR 1926 Mad 494 92 IC 541 Where the debtor has filed a list of his assets he cannot be required to prove that he has no other property except the one mentioned in the list It is for the creditor to prove affirmatively that he has properties sufficient to satisfy his debts, *Sita Ram v Hukam Chand*, AIR 1927 Lah 354 101 IC 624 The finding as to inability to pay must be arrived at judicially with reasons given therefor which can be checked, and the matter must be considered from the point of liquid assets, *Mathura Ram v Baldeo Ram* AIR 1924 All 800 80 IC 21 As to what is debt see p 14, ante

Clause (a): Five hundred Rupees This clause fixes a statutory limit for the amount of the insolvent's debts Non compliance with the provisions of this clause will affect a debtor's claim for adjudication unless he comes under clauses (b) and (c) Where a debtor is *jointly* and *severally* liable together with others for a debt exceeding Rs 500/- he can apply for insolvency, *Gangaram v Ram Chandra*, 20 IC 259 9 L R 91 *Ghulam Husain v Rameshwar Das*, AIR 1927 Lah 108 99 IC 524, where several persons are *jointly* and *severally* liable for one debt exceeding Rs 500, each of them will be qualified as regards the amount of debt, *Ghulam Haidar v Mangal Sen Desraj*, AIR 1926 Lah, 235 27 Punj L R 49 98 IC 426 See also *Ananta Kumar v Sadhu Charan* AIR 1926 Cal 234 87 IC 751 Whether this statutory limit has or has not been reached should first be determined before an adjudication order is made in favour of a debtor who relies on clause (a) It seems to have been so maintained in *Samiruddin v Kadumozzi*, 12 C L J 445 15 C W N 244 The present Act has however made a few provisions in sec 25 (2) to the effect that the Court *shall* dismiss the debtor's petition if it is not satisfied as to his right to present the petition, and the debtor has no such right under cl (a) of sec 10 if the statutory limit is not reached

When the debtor's such right is founded upon the ground that his liabilities have reached the statutory limit, the Court *shall*, under sec 24 (1) (a), require proof of this fact. So, if a creditor challenges the debt shown as due to another creditor as a mere fictitious entry in the petition, the Court should investigate the matter (*Khushhali v Bholar Mal*, 37 All, 252 13 A L J 270 28 I C 573) and should bring the result of his investigation to bear on the question of the statutory limit, which, if thereupon be found to have been under reached, the Court should dismiss the petition under sec 25. It should be noticed that this view of the law does not militate against the doctrine of "automatic adjudication" upheld in the following cases, *Lday Chand v Ramkumar*, 12 C L J 400 15 C W N 213, 7 I C 394, *Samiruddin v Kadumoyi*, 12 C L J 445 15 C W N 244 7 I C 691, *Chhatrapat Singh v Kharag Singh*, 44 Cal, 535 25 C L J 215 21 C W N 497, P C, *Jagannath v Ganga Dat* 41 All 486, and the other cases at p 86. Money due under the decree of a Rent Court is a "debt" within the meaning of this clause, *Munna Singh v Digbijai Singh*, 19 A L J 273 60 I C 758. Compare this case with *Parbati v Raja Shyam Rukh*, 20 A L J 147.

Clause (b): Under Arrest or Imprisonment The repealed Act contained the words "He has been arrested or imprisoned etc". This change has perhaps been thought necessary in view of the fact that the language of the old Act is open to the construction that the debtor was *once* arrested or imprisoned, but the arrest or imprisonment is no longer *subsisting* though such a construction would be very much forced and not strictly grammatical. Cf sec 11 below. The present Act however makes it clear that the arrest or imprisonment must be *subsisting* at the time of presenting the insolvency petition. So it has been held that a judgment debtor who has been arrested but released after a few hours detention cannot apply to be adjudged an insolvent after his release, *Jumai v Muhammad Azim Ali* 25 All 204 also see *In re William Hastie*, 11 Cal, 451. Similarly, an arrest should precede the application and a subsequent arrest will not confer on the petitioner a right to continue an application filed before the arrest *Dit Mal v Saudagar Mal*, A I R 1927 Lah 38 98 I C, 885. Note that the Act mentions both 'arrest and 'imprisonment,' obviously to guard against a possible contention that 'arrest' does not include imprisonment and that they are distinct things as was contended in a Bombay case, *Mahomed Hussein v Radhi* 12 Bom 46 see also *In re Quarne*, 8 Mad, 503. Note the use of the word 'or'.

Clause (c): Attachment etc. The attachment must be *in execution* of a decree for payment of money. The

"such" shows that the decree must be of the same nature as that referred to in clause (b) Attachment *not in execution of decree* (e.g. attachment before judgment) will be of no avail. For the same reason, no insolvency petition can be founded on an attachment in execution of a money award, comp *Ram Sahai Mull v Joylall*, 32 CWN 608 AIR 19, S Cal 840. The attachment must be *subsisting* at the date of the presentation of the insolvency petition. So, where the attachment is withdrawn or liquidated or the attached property is already sold, there is no right to present the petition. The attachment must be *against the insolvent's property*. Cf *Harish Chandra v E I Coal Co*, 16 CWN 733 (a case under the Presidency Act), see also *Jumai v Muhammad Azim Ali* 25 All, 204 23 A W N, 11.

Sub-sec. (2) The provision of this sub section is new and is intended to prevent a common abuse often made of the insolvency law. Formerly when a debtor was in difficulty with his creditors, he would make an application for insolvency, and as soon as he succeeded in obtaining an adjudication order in his favour he would abandon the proceeding. But when he would again be pursued by his creditors he would resort to the Insolvency Court for fresh reliefs. Thus, an insolvent would enjoy the immunity that the insolvency law conferred on him without fulfilling the obligations the said law imposed on him. Read the following emphatic condemnation of this practice by Sir George Lowndes — "The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors. As the Usurious Loans Act was introduced for the protection of honest debtors against dishonest creditors, so an amended Insolvency Act is necessary for the protection of honest creditors against dishonest debtors. I will pursue for the moment the course of the dishonest debtor, he files his petition and if he is in jail he automatically gets his release under the existing Act and he is practically protected from going to jail again. That is sufficient for him, that is all he wants. he does not want to pay his debts, all he wishes is to escape the penalty of jail. It is not necessary for him to apply for his discharge and until he applies for it, the Court has practically no power over his misdoings." (for the full speech *vide supra*) Before the passing of this Act cases of this description often arose for consideration before the Court, and the Court in absence of clear provisions had to invoke its inherent jurisdiction in order to discourage such successive applications as an abuse of the processes of the Court, see *Malchand v Gopal Chandra*, 44 Cal, 899. See also the reasons given by the Select Committee for introducing this clause. As to the effect of the amendment of 1927, *vide* p 84, *supra*. This sub-section, implies that, apart from annul-

ment, a second petition lies, *Yerra Venkatagari v Maddipatta*, (1927) M W N 176 AIR 1927 Mad, 179- 101 IC 349

It should be noticed that the leave contemplated by the sub-section is not necessary in the case in which the previous application for insolvency was dismissed before the order of adjudication. In fact the refusal of an application for declaration of insolvency does not necessarily bar a second application for the same purpose, *Muhammad Shia v Mahabir Prosad*, 15 A L J 572. The statute does not provide that a leave may be granted on questions of facts, nor does it provide that the District Court should not grant leave on questions of facts. The matter is however, in the discretion of District Court, *Shibjee Shah v Hira Lal*, AIR 1928 Pat 23 104 IC 613. Where an adjudication is annulled for omission to apply for discharge within the appointed time and such omission arose from an impression in the insolvent's mind that his estate having been under administration by the Official Receiver, he needed not to apply till the assets in the Receiver's hand had been distributed among the creditors, leave here under should be granted for a fresh application for adjudication *Beh Ram v Mangal Das* AIR 1928 Lah 452 111 IC 23. Leave should likewise be granted for fresh petition where the insolvent was misled by an obscure order of the Court and failed to apply for discharge within the fixed time and in consequence his adjudication was annulled *H Gee v Shib Narain* AIR 1929 Pat 184 118 IC 332.

Remedy on ex-parte order of annulment of adjudication As to whether the remedy of a person aggrieved by an *ex-parte* order annulling an adjudication lies in a proceeding under O IX of the C P Code or in a petition hereunder *vide* *Penugopalachari v Chunnimal* cited under sec 43 under the heading "Effect of annulment"

Effect of Presentation of Insolvency petition no Execution The mere presentation of an insolvency application does not prevent the execution of a decree *Ram Bharosey v Sohan Lal* LR 5 A 408 AIR 1924 All 207 82 IC 1.

11. [§ 6 (2)] Every insolvency petition shall be presented to a Court having jurisdiction under this Act in any local area in which the debtor ordinarily resides or carries on business, or personally works for gain or if he has been arrested or imprisoned where he is in custody:

Court to which petition shall be presented

[New] *Provided that no objection as to the place of presentment shall be allowed by any Court in the exercise of appellate or revisional jurisdiction unless such objection was taken in the Court by which the petition was heard at the earliest possible opportunity, and unless there has been a consequent failure of justice*

Review. This is sec 6 (2) of the Act of 1907 with the addition of a *proviso* and has its origin in sec. 4 (1) (d) of the English Bankruptcy Act, 1914 under which a petition will not be good unless the debtor is domiciled in England within a year before the date of the presentation of the petition and has ordinarily resided or had a dwelling house or a place of business

Jurisdiction Every insolvency petition, whether by a creditor or by a debtor must be presented to a Court *having jurisdiction* under this Act. As to which Courts have jurisdiction under this Act, see section 3 and the notes thereunder at pp 23 24. See also *In re Tamincharan*, 11 B.L.R. App 25. It should be noticed that the section equally applies to a creditor's and a debtor's application. The section does not say what will happen when a District Court enjoys a *concurrent* jurisdiction with a Subordinate Court. We are apt to think that in such a case the principle of sec 15 of C.P. Code will apply.

Adjudication by foreign Court does not affect jurisdiction under this Section Adjudication by a foreign Court, will not operate to preclude the filing of a petition for adjudication under this Act, if jurisdiction of the Court can be invoked under this section. Cf *Re a Debtor*, (1922) 2 Ch 470 (C.A.) Cf 43 C.L.J. 436

Ordinarily resides or carries on business : The term "residence" is an elastic one, it cannot be given, *Anilaba*. It ordinarily denotes the place and sleeps or where his family or servants eat, drink and sleep, *R v North Curry*, (1825) 4 B and C 953. "A man's residence is where he habitually sleeps." *In re Oldham*, (1870) 1 O'M and Ha, 158. It is not convertible or identical with ownership, *R v Fermanagh*, (1897) 2 I.R. 559 (564). *R v Tyrone*, (1901) 2 I.R. 497 (510). The residence of a man is primarily the dwelling and home where he is supposed usually to live and sleep, it may also include a man's business abode, the place where he is to be found daily; *Kumud Nath Roy v Rai Jatindra Nath*, 38 Cal 394, 15 C.W.N. 399, 13 C.L.J. 221. But long residence is not necessary; even temporary residence for a time and for a particular purpose is enough.

to give the Court jurisdiction in insolvency proceedings *Abdul Raak v Basiruddin*, 17 CWN 405 15 CLJ 457. The language of this observation has not been hedged in by suitable limitations with the result that it has enabled unscrupulous persons to practise fraud upon the law and by temporary shiftings and sojourn to dupe the judiciary into granting adjudication in an atmosphere beyond the reach of effective opposition. Under the English law also the residence may be a temporary residence for a substantial time and for a particular purpose. *Ex parte Hecquard* (1889) 24 QBD 1 cited with approval in 17 CWN 405. For an exhaustive commentary on the meaning of the term see *Anilabala v Dhirendra* 32 CLJ 314. A foreigner who had a room in a hotel in London for 18 months before presentation of a petition was deemed to be a resident in England. *Re Norris Ex parte Reynolds* (1885) 5 Moor 115 but a Scotsman who occasionally comes and stops in London is not so. *Re Erskine* (1893) 10 TLR 32. Residence does not necessarily imply a permanent or continuous residence it is sufficient if the debtor is a *bona fide* resident of the place for the time being. *Re De Momet* 21 Cal 634. *Lakshmi Narayan v Subra Maniya* (1921) MW N 328 45 MLJ 129 AIR 1923 Mad 585 3 IC 4. So where a person resides with his relatives at a place for the time being the Insolvency Court of that place will have jurisdiction to entertain his application for insolvency. *Henri Tloia v Victor v Md Gul Khan* 39 IC 453 sc 4 O LJ 106. Occasionally leaving the place does not take away the *continuity* character of the residence 45 MLJ 129 3 IC 4 (*supra*). But this does not mean that casual stopping with a relative at a certain place will give jurisdiction to the Court. *Madhav Pershand v Walton* 18 CWN 1050. Similarly where a person takes a temporary residence at a place with the object of filing his schedule of insolvency there the Insolvency Court of the locality will refuse to entertain his insolvency petition. *Sugamariam v Pitchai* 10 IC 786. The Courts should always see whether the transterritorial application is inevitable or it is only a part of the scheme to evade or shut out opposition but it is regrettable that they seldom do so. The term "residence" may be used in two senses the one denoting the personal habitual habitation the other constructive technical and legal habitation. His *personal* abode is where he constantly lives with his family. Such an abode will be his *legal* habitation as well. The *personal* and *legal* habitation may not always be the same for instance a person has a permanent family dwelling house at a place but passes a great portion of his time with his family in other places here the former will be his legal and the latter his personal residence see *Anilabala v Dhirendra* 32 CLJ 314. Both these sorts of

residences may create jurisdiction under this section. Therefore, a merchant residing at different places can be adjudicated by the Court within whose jurisdiction he has his ancestral house and lands, *Kasi Iyer v Official Receiver Tanjore*, (1925) M W N 797. When the jurisdiction of a Court is determined by the residence of the insolvent, it will not be ousted simply by the fact that the majority of the insolvent's creditors live outside the jurisdiction of the Court, *Khelar Chunder v De Monte* 51 P R 1874. Residence is primarily a question of fact. Ordinarily, where a man is expected to be found all throughout the year that will be his residence. The term is however a flexible one. In case of traders carrying on business at several places, their place of residence is manifestly the place where they earn a living and do their daily work, nor does that place cease to be their residence simply because for purposes of rest or recreation or family ties they occasionally return to the house where they and their family have been brought up. *Municipal Board v Hafir Alabaksh*, 22 A L J 45. Cf *Walcot v Batfield* 1854 Ky 534 101 R R 719. Where a man keeps more than one establishment, each of them will be his residence. *Re Moir* (1884) 25 Ch D 605, *Re Wright* (1915) A C 717. If a man who is too poor to have a permanent or continuous residence at a place remains within the limits of a District the Court of that District will have jurisdiction notwithstanding the fact that he occasionally went out of it, *Lakshminarain v Subramania* 45 M L J 129 (1923) M W N 328 A I R 1923 Mad 585 73 I C 74, *supra*. But a mere visitor or a person who puts up at a place with the simple object of obtaining benefit of the Act, cannot claim a similar position. see *Re De Momet* 21 Cal, 634, *supra*. Cf also 1 B L R 84 (O C), 10 I C 786 (L B).

This section precludes a Court from exercising insolvency jurisdiction over a foreigner domiciled and resident abroad, *Ex parte Blain* (1899) 15 Ch D 522.

The expression *carry on business* is a very elastic one, and almost incapable of definition and the tribunal must in each case look to the particular circumstances, *Maharaja Monindra Chandra v Chundy Churn*, 24 C W N 582, s c 31 C L J 327, see also *Goswami Giridhari v Goverdhone*, 21 I A, 13 18 Bom, 294 (P C). If a man has an interest in a business and a voice in what is done, a share in the gain or loss and some control, if not over the actual method of working at any rate, upon the existence of the business at a place, he will be deemed to be carrying on business there, *Kripa Ram v Mangal Sen*, 19 A L J 696 (*infra*). A business is deemed to be carried on so long as there are debts undischarged and assets to be got in and the appointment of the Receiver would

not affect the question, *Gokul Das v Duarka Dass*, 48 Mad, 795 49 M L J 457 22 L W 411 (1925) M W N 749 A I R 1925 Mad 1249

For a man "to carry on business" at a place it is not necessary that he should have an office or regular place of business there, *Greesk Chunder v Collins*, 2 Hyde, 79 It is not also necessary that the business should be conducted by the debtor personally it may be carried on by his agent, manager or servant, Cf *Multhaya v Allan*, 4 Mad, 209, *Kripa Ram v Mangal Sen*, 19 A L J 696 A I R 1922 All 337 65 I C 73 This is obvious from the fact that the word "personally" is mentioned in the case of the works for gain and not in the case of business So where a firm carries on business through agents at a particular place the Court of that place has jurisdiction to adjudicate it insolvent though its principal centre of business is elsewhere, *Chetandas Mohandas v Rali Brothers*, 1925 Sind, 153 83 I C 135 Cf A I R 1926 Sind, 18 97 I C 446

N B We have similar expressions in sections 16 and 20 of the Code of Civil Procedure, 1908, so the cases under those sections may be referred to in this connection

Has been arrested etc Compare this expression with the language of Clause (b) of Sec 10 above The expression no doubt here implies a *subsisting* arrest or imprisonment other wise how could the debtor be in custody It means the same thing as "under arrest etc" See p 91, *ante* Also see *Jumai v Muhammad Azim* 25 All, 204 23 A W N 11

The word "or" in the latter part of the first paragraph of the section has been used in its ordinary sense, it marks alternatives and gives the debtor an *alternative* choice It does not restrict the debtor to present his insolvency petition only to the Court within whose jurisdiction he is in custody, notwithstanding the arrest or imprisonment, he can apply even to Courts which have jurisdiction over his residence and place of business *Ghansam Das v Vishudevi* 5 S L R 259 15 I C 830

Proviso: Objection to territorial jurisdiction :

The proviso is new It lays down that an objection as to territorial jurisdiction of a Court should not be allowed to be raised for the first time in an appeal or in a motion, and that such an objection should not at all be raised for the first time in an appeal or in a motion, and that such an objection should not at all be raised in an appeal or in a motion *unless illegal exercise of jurisdiction has led to miscarriage of justice* *Periya Karuppan v Angappa*, 21 L W 52 A I R 1925 Mad 483 86 I C 229, *Kasi Iyer v Official Receiver, Tanjore*, (1925) M W N 797 23 L W 353 A I R 1926 Mad 228 93 I C.

914 Objections as to jurisdiction can be raised before an appellate or revisional Court only under two conditions—(a) when such objection was taken in the Court of first instance and (b) when such illegal exercise of jurisdiction has caused failure of justice Cf *Ibid*

Earliest opportunity An objection as to jurisdiction ought to be taken at the earliest opportunity, such an objection should not be allowed after the objecting party had taken the chance of a decision in his favour on the merits, *Ex parte Suinbanks*, (1879) 11 Ch D 525 (537), *Ex parte Butlers, In re Harrison*, (1880) 14 Ch D 265

This proviso has been found necessary to undo the effect of the decision in *Madho Pershad v Walton*, 18 CWN 1050, which has held that the principle of sec 21 of C P Code, 1908 that no objection as to the place of suing shall be allowed by any appellate Court does not apply to insolvency proceedings and therefore proceedings in a Court having no jurisdiction are liable to be set aside The reason for the introduction of this proviso has been thus explained by the Select Committee—"Section 6 (2) (now sec 11) lays down where an insolvency petition is to be presented but does not contain any saving in the event of the petition being presented in the wrong Court The point was raised in *Madho Pershad v Walton* 18 CWN 1050 20 IC 370, where the insolvent successfully presented an appeal on the ground that the petition had been presented in the wrong Court This proviso is intended to stop this loophole in the existing law"

Fresh petition on dismissal for want of jurisdiction Where a petition is dismissed for want of jurisdiction, it is still open to the petitioner to present a fresh petition in the proper Court *Madho Pershad v Walton*, 18 CWN 1050 20, IC 370

12. [§ 6 (1)] Every insolvency petition shall be in writing and shall be signed and verified in the manner prescribed by the *Code of Civil Procedure, 1908*, for signing and verifying plaints

Change of Law This is old sec 6 (1) with the omission of the portion "and the procedure laid down in the said Code with respect to the admission of plaints shall, so far as it is applicable, be followed in the case of such petitions" which now forms a separate section, viz sec 18 This section lays down that (1) every insolvency petition shall be in writing (2), it shall be signed and verified in the manner prescribed by O VI, rr 14 15 of the *Code of Civil Procedure, 1908*

Signed and verified As in O VI r 14 the petition must be signed by the party and his pleader. If the petitioner, by reason of his absence or any other good cause, is unable to sign the application himself, it may be signed by his duly authorised agent. The petition *shall* also be verified at the foot by the party or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case see O VI, r 15, C P C. Cf *In re a Debtor* (1910) 2 K B 59. Unless the petition be duly verified there can be no adjudication order, see *In re Bethal Das* 12 C W N 538. The section uses the word *shall* which necessitates strict compliance with the requirements hereof. If the insolvent is unable to verify the schedule on account of his absence from India it should be verified by an affidavit sworn before a Notary public or the British Consul. *In re Anstruther* 11 B L R Ap 34. As to the mode of verification on behalf of a Bank see *Ranikamal v Bank of Bengal* 5 C W N 91 also O xxix r 1 C P C. Having regard to the corresponding provision of the C P Code it seems likely that defective signatures and verifications can be allowed to be amended see *Rajit Ram v Katesar* 18 All 396. *Basdeo v John Smidt* 22 All 55. As to the signing of an insolvency petition by a firm see Calcutta Rules (new) 19 22 and 24 also *Satish Chandra v Firm of Rajnarain Pakhura* 72 I C 60 cited under sec 79 *infra*. A creditor's petition may be signed by his attorney *Ex parte Richards* (1884) 14 Q B D 22.

13 [§ 11] (1) Every insolvency petition presented by a debtor shall contain the following particulars namely —

Contents of petition

- (a) a statement that the debtor is unable to pay his debts
- (b) the place where he ordinarily resides or carries on business or personally works for gain or if he has been arrested or imprisoned the place where he is in custody
- (c) the Court (if any) by whose order he has been arrested or imprisoned or by which an order has been made for the attachment of his property together with particulars of the decree in respect of which any such order has been made

(d) the amount and particulars of all pecuniary claims against him together with the names and residences of his creditors so far as they are known to, or can by the exercise of reasonable care and diligence be ascertained by him,

(e) the amount and particulars of all his property, together with—

(i) a specification of the value of all such property not consisting of money,

(ii) the place or places at which any such property is to be found, and

(iii) a declaration of his willingness to place at the disposal of the Court all such property save in so far as it includes such particulars (not being his books of account) as are exempted by the *Code of Civil Procedure*, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree,

[New] (f) *a statement whether the debtor has on any previous occasion filed a petition to be adjudged an insolvent, and (where such a petition has been filed)—*

(i) *if such petition has been dismissed, the reasons for such dismissal or,*

(ii) *if the debtor has been adjudged an insolvent, concise particulars of the insolvency, including a statement whether any previous adjudication has been annulled and, if so, the grounds therefor*

(2) Every insolvency petition presented by a creditor or creditors shall set forth the particulars regarding the debtor specified in clause (b) of sub-section (1) and shall also specify—

- (a) the act of insolvency committed by such debtor together with the date of its commission and
- (b) the amount and particulars of his or their pecuniary claim or claims against such debtor

Review This is old sec 11 with the addition of a new clause 117 clause (f) *ide supra* Cf sec 6 (1) of the Bankruptcy Act 1914

Arrangement of the Section It contains two clauses—Clause (1) refers to an insolvency petition by the debtor, and clause (2) refers to that by the creditor. Clause (1) contains six sub-clauses mentioning various particulars which as far as practicable should be stated in the debtor's application. Of these the particulars in clause (b) should be stated even in the creditor's petition. Sub-clauses (a) and (b) of sub-section (2) contain additional particulars to be specified in the creditor's petition.

Effect of mis-statement The section uses the word *shall* so it is obligatory upon the creditor or the debtor as the case may be to supply the necessary particulars mentioned in the section. If the necessary particulars are omitted the petition should be returned to the party for amendment. A petition in which the act of insolvency or the date of its commission is not duly set out may be allowed to be amended. *Re Dunhill* (1800) 62 L.T. 943 7 Mor 235 (1894) 2 Q.B. 234.

Power of Amendment The Court has power to allow amendment of a petition even after the making of the receiving order. *Re a Debtor* (1922) 2 Ch 470 (C.A.) (1922) 2 K.B. 109 (C.A.)

Misstatement of particulars of all the pecuniary claims against the debtor in his petition does not disentitle him to an order of adjudication. *Karim Baksh v. Mahabia Bania* 12 I.C. 685 (Cal.). Even when such misstatement is the result of bad faith on the part of the insolvent that would not stand in the way of his obtaining an adjudication order though the propriety of his conduct may subsequently be reviewed and penalised. So it has been maintained that when the insolvent includes bogus debts in his schedule he is guilty of bad faith and can suitably be dealt with at a later stage. *Manilal v.*

Blagar an Das, 26 IC 24 (All), similarly, concealment of the insolvent's properties from the list of his assets is no ground for refusing adjudication, *Jeer v Rangaswami* 36 Mad, 402, see also *Kappuramari v Guntur Cotton Mills Ltd*, 14 MLT 587 (1914) MW N 153, *Laxmi Bank Ltd v Ram Chandra*, 46 Bom. 751 24 Bom, LR 292 AIR 1922 Bom 80 67 IC 238

Amendment is permissible if necessary particulars are omitted from the petition, see O VI, r 17, C P Code read with sec 4 of this Act, also sec 109 (3) of the English Bankruptcy Act, 1914, comp *Mahomed Ayub v G P Gunnis & Co* 19 IC 19 For amendment in case of mis-statement *vide* under the last heading Ordinarily, an amendment of a bankruptcy notice is not allowed except in the case of merely formal defects *Ex parte Rylands*, (1891) 8 Morr 80 As to how an omission to mention a security was allowed to be rectified by means of amendment see *Re a Debtor, supra* An omission to state that the petitioner is a secured creditor or to value the security is curable by amendment, but an amendment shifting the cause of action so as to defeat a possible plea of limitation is not permissible, *Gunnis & Co v Mahomed Ayub*, 37 Mad 555 An amendment to bring in the names of new creditors as joint petitioners for insolvency is not permissible after 3 months from the act of insolvency upon which the petition is founded, *Re Maund*, (1895) 1 QB 104 In a case where a petition presented by a bare trustee was dismissed on the ground of non joinder of the *cestui que trust* the Court of appeal gave leave more than 3 months after the presentation of the petition to amend by adding the *cestui que trust*, *Ex parte Pearce* 14 QBD 184 Cf *Re Ellis*, 4 Morr 283 The general conditions on which an amendment may be allowed by a Court of law will be found summarised in the case of *Lendra Nath Roy v Rai Janaki Nath Roy* 22 CW N 611 Comp also *Ganendra Nath v Paresb Nath*, 26 CW N 73

Clause (a) Unable to pay Unless unable to pay his debts the debtor is not entitled to present an insolvency petition see sec 10 *ante* and the notes thereunder, see also *Pornusami v Narasimma* 25 MLJ 545 The allegation of inability to pay the debts is a substantial part of the debtor's claim to be declared insolvent and want of proof of that fact disentitles the debtor to present a bankruptcy petition, *Ilamelumangathayarammal v Balusami*, (1928) MW N 62 AIR 1928 Mad 91 108 IC 208 Such inability to pay need not be strictly proved, it will be sufficient if a *prima facie* case is made out, see proviso to sec 21 Cf *Bhagirath v Jami*, 101 IC 445 (Pat)

Clause (b): Ordinarily resides See pp 94-95, *ante*

Clause (c): Has been arrested See p 97, *ante*

See also sec 11 and the notes thereunder The arrest must be a subsisting and not a long-dropped one, *Jumai v Muhammad Kazim*, 25 All, 204 23 A W N 11

Sub-Clause (d): All pecuniary Claims Such claims include all the debts proveable under sec 34 (1) of this Act A statement in the petition as to the debt of a creditor will operate as an acknowledgment within the meaning of sec 19 of the Limitation Act, *Ram Pal v Nanda Lal*, 16 C W N 346 See also 16 C W N 84n Arrears of maintenance due from the insolvent are his debts and should be mentioned in the schedule, *Tokee Bibee v Abdool Khan*, 5 Cal, 536, 5 C L R 458 As to the effect of misstatement of particulars of pecuniary claims, *vide* 19 I C 15 (Cal), *supra*

As to the risk that a debtor would run by omitting from the list the particulars of all pecuniary claims against him together with the names and residences of his creditors under the clause, see *Mian Goman Singh v Ganesh Lal*, 35 P R 1888

Sub Clause (e) This clause requires all the debtor's assets to be mentioned in the schedule Money due to an insolvent from a Provident Fund is part of his assets and should be mentioned in the schedule *In re Chrewsbury*, 10 Bom, 313

Sub Clause (i) Money has been excluded for this simple reason that it does not require to be valued

Sub Clause (ii) The petition should state the place or places where the moveables mentioned in the schedule are to be found, *Hatkins v Roheem Bullub*, 10 B L R Ap 11

Sub Clause (iii) Declaration of Willingness This declaration is formal such willingness may be implied from the very fact of his application for insolvency Whether the debtor be willing or unwilling that does not matter, because the very effect of an adjudication order is to vest his property in the Court or a Receiver See sec 28 *post* and the notes thereunder One cannot apply for insolvency and at the same time be unwilling to part with his property Such declaration should be in respect of all his properties excepting such of them as are exempted by sec 60 of the Code of Civil Procedure from attachment This exception however does not apply to account books though not liable to attachment within sec 60 of the C P Code The insolvent should be prepared to make over his account books to the Court The reason for this is perhaps that they play a very important part in the ascertainment of the assets and liabilities of the debtor

By any other Enactment Cf The Indian Marine Act (Act XIV 1887), sec 81 The Bhagadari Act (Bom Act

of 1862), The Pensions Act (Act XXIII of 1871), secs 4 and 11 under which pensions cannot be attached The Provident Fund Act (Act XIX of 1925), sec 4 The Bundelkhand Land Alienation Act The Agra Tenancy Act and the other Tenancy Acts of the different provinces and so on Also see the notes and cases under sec 28, sub-sec (5) Agricultural holdings under C P Tenancy Act are exempt from attachment, *Sitaram v Shk Sardar* 13 N L R 215 42 IC 710

Clause (f) This clause is new The introduction of this clause has been necessitated by the enactment of the new provision in cl (2) of sec 10 This clause provides that the debtor should also state in his application whether he filed any insolvency petition on a previous occasion, and if so, what was the result thereof that is, whether the same was dismissed or he was adjudged an insolvent thereupon, of course, always giving the reasons or grounds therefor An early disclosure about previous insolvency petitions will go to prevent all possible attempts to evade the provisions of sec 10 cl (2), which oblige an insolvent to seek permission from the Court after submitting himself to the Court's scrutiny as to his previous conduct and general intention The rejection of a previous application does not however bar a second application for the same purpose, *Mhd Shia v Mahabir*, 15 A L J 572

Dismissal for default of the previous petition a bar to a second petition, *Shah Abdul Aziz v Lalit Chandar*, 22 C W N clxxv (171), especially when a new cause of action has arisen out of arrest in execution of a decree subsequent to the dismissal of the former application, *Ram Prasad v Mahadeb*, 2 Pat L T 335 61 IC 870, also *Yerra Venkatagiri v Maddipatla Konappa* (1927) M W N 176 A I R 1927 Mad 579 101 IC 349 which says that sec 10 (2) of the Act implies that apart from annulment, a second petition lies vide also the notes at p 44 Cf *Salig Singh v Ram Kishen*, 10 A L J 51, *Abdul Aziz v Habib Mistri* 40 IC 259, *Chauthmal v Khem Karam* A I R 1928 Pat 116 107 IC 842 Under the repealed Act such a disclosure was not necessary and therefore a petition could not be dismissed for the mere omission to do so *Muhammad Shia v Mahabir*, 15 A L J 572 40 IC 415 In this connection a question of some interest may arise as to whether a fresh application for adjudication on the same facts by a debtor is maintainable The question is not free from difficulty and must be decided according to the merits of each application But consensus of opinion points to the following

conclusions (1) If the new application is *bona fide* and is the outcome of a natural grievance arising from the misfortune attending an earlier application, the Court will entertain it (2) But on the other hand if it is for an inequitable or collateral purpose it will be looked upon as an abuse of the process of the Court and will necessarily not be countenanced see *Ex parte King* (1876) 1 Ch D 461, *Ex parte Griffin* (1870) 12 Ch D 480, *Ex parte Tinte* (1880) 15 Ch D 125, *Re Belts*, (1901) 2 KB 30, *Re Sabhapatti* 21 Bom 207, *Sheikh Samiruddin v Kadumov* 12 CLJ 445 15 CWN 244, *Malchard v Gopal Chandra*, 21 CWN 308 followed in *Re Balla: Chand Serojgee*, 27 CWN 739 (a case under the Presidency Towns Insolvency Act) It has been held in a Lahore case that the dismissal of the first petition for insolvency because of failure to produce evidence does not bar the second petition on the general principles of *res judicata* as in the previous case there was no trial on the merits, *Hasan Din v Airfa Ram*, AIR 1928 Lah 374 109 IC 86 Sec 10 (2) provides a special procedure by means of which a debtor, in respect of whom an order of adjudication has been annulled under sec 43, can get his remedy, therefore it will not be open to the Insolvency Court, in such a case to set aside its order under the provisions of O 14 of the C P Code, *Penn gopalachariar v Chunilal*, 49 Mad 935 51 MLJ 209 (1926) MWN 674 AIR 1926 Mad 942 97 IC 706

Where an application made by a debtor for insolvency was rejected as also the application made by a creditor for adjudication as insolvent of the said debtor and thereupon another creditor made a similar application, the Court held that the dismissal of the previous application did not operate as *res judicata* in the later proceeding though the second applicant was a party to the first application, *Chauthmal v Khem Karam*, AIR 1928 Pat 116 107 IC 842

A person who has been declared an insolvent cannot apply for a second order of adjudication until he has obtained an order for discharge or until his previous adjudication has been annulled, *Ram Das v Sultan Husain*, 6 OWN 100 AIR 1920 Oudh 140 115 IC 107 As to fresh application on an alleged act of insolvency committed during the operation of a previous bankruptcy proceeding see *Iachmi Chand v Bepin Behari*, 32 CWN 716 (a case under the Presidency-Towns Insolvency Act)

Sub-Sec. (2) (1) A petition by a creditor shall contain the particulars specified in cl (b) of Sub-section

that is, those regarding the debtor's residence and place of business and the place where the debtor is in custody, if arrested or imprisoned, (ii) It should also specify the act of insolvency relied on and the date thereof, (iii) the amount of debt in the case of a single creditor and the aggregate amount in the case of plurality of creditors joining in the petition. It seems that if the act of insolvency is not set out in the petition, the petition will be incompetent. Cf *Vasanti Mulji v Mulji Ranchod*, 50 Bom, 624.

For residence etc See pp 94 95 *ante*. The date is necessary for the limitation provided in sec 9 (1) (c). Names of new creditors cannot be put in the petition by way of amendment after the lapse of three months from the act of insolvency on which the petition is founded, *Re Maund*, (1895) 1 Q B 194. As to whether a creditor can avail himself of an act of insolvency committed on a date on which he was not the creditor of the insolvent see *Mutia v Lakshminaree*, 13 L W 141 61 IC 756.

In the petition of a secured creditor the particulars mentioned in sec 9 (2) must be stated.

14. [§ 7.] No petition, whether presented by a debtor or by a creditor, shall be withdrawn without the leave of the Court.

Withdrawal of petitions

Review This section corresponds to secs 5 (7) and 6 (2) of the English Bankruptcy Act, 1914 and secs 15 (2) and 13 (8) of the Presidency Towns Insolvency Act III of 1909. It uses the word "petition" and not "insolvency petition" which is used in the preceding sections. So all manner of petitions come within the purview of the section. This prohibition against the withdrawal of an insolvency petition without the permission of the Court serves to check the use of the bankruptcy law for collateral purposes or as an abuse of the processes of the Court. Cf *Koppurajurru v Guntur*, (1914) M H N 153 22 IC 276 *Gadigi Mudappa v Parameswara*, *infra*.

Withdrawal An insolvency petition whether presented by the debtor or the creditor cannot be withdrawn except with the leave of the Court, *Gadigi Mudappa v Parameswara* 20 L W 880 A I R 1925 Mad 242 85 IC 303. Before the Court grants any such leave it should be informed of the facts of the case and the proposed terms of withdrawal, so that it may exercise its judgment as to whether it is a fit case for allowing a withdrawal, *Re Bebro*, (1900) 2 Q B 316. Leave should not be granted simply on the ground that the debtor has come to an arrangement with his creditors. If the Court is

satisfied that the parties desire to take the case out of Court, the proper course is to dismiss the petition *In re Pyarichand*, 6 B L R 558. If a petitioning creditor after settling his claim with the insolvent applies to the Court for permission to withdraw the insolvency petition it is open to the Court to refuse leave and to pass an order of adjudication, *Gadigi Mudappa v Parameswara*, *supra*. A

No withdrawal after petition for insolvency should not be adjudication allowed to be withdrawn after an order of adjudication has been made *In re*

Fleming Shaw & Co 10 S L R 47 35 I C 539 especially if the insolvent is adjudicated on his own petition. Cf *Maung Myint v Official Assignee* 3 Rang 313 A I R 1925 Rang 351 90 I C 969 *Re Subrat Jan* 38 Bom, 200 15 Bom L R 748 20 I C 859 *Re Hester* (1889) 22 Q B D 632 6 Morrell 85. After adjudication is made the insolvent cannot be allowed to withdraw his petition on the ground that he has settled with his creditors *Re Subrat Jan supra*. After adjudication nor is a petitioning creditor entitled to settle his claim with the debtor out of Court and withdraw from the proceeding *In re Shivalal* 16 Bom L R 365 40 I C 207. It was perhaps on this principle that the Calcutta High Court recently refused to recognise a private arrangement with the creditors and payment to them in accordance therewith *Beharilal v Harsookdas* 25 C W N 13 61 I C 904. Cf *Re Subrat Jan Mohamed* 38 Bom 200 15 Bom I R 748 20 I C 859 *supra*. The English rule under which leave to withdraw may be given after the making of a receiving order furnishes no justification for withdrawal after adjudication. After an adjudication order is made there is no backing out of it except by its annulment or by an order of discharge and a simple application for withdrawal from the petition cannot be used as a device to get rid of the adjudication 35 I C 539 *supra*. The Court cannot impose any condition as to creditor's costs being paid precedent to permission for withdrawal *Haridas Shah v Jamna Das* 17 All 156.

The effect of an order of withdrawal after the property has been vested in the Official Assignee is not to divest the Official Assignee and re-vest the property in the insolvent so the Official Assignee who has already instituted a suit in respect of a debtor's property can continue it after the order of withdrawal *Haji Sajjan v Macleod* 37 Bom 31 10 Bom L R 178.

An infant may be allowed to withdraw his petition *In re Hansraj Malji* Bom 411 but it is doubtful whether such withdrawal comes within the purview of this section. It seems that this section refers only to those petitions which have been justly presented and over which the Court has jurisdiction.

It is obvious that notwithstanding the order of withdrawal, the mere fact that the debtor filed the insolvency petition remains an act of insolvency within the meaning of sec 6 (f) to sustain a creditor's petition

Notice Though the section does not say anything about the question of notice being given by the petitioner (whether he be the debtor or a creditor) to the other parties to the insolvency proceedings, still the Court should not grant any withdrawal without any notice to the parties who may be affected by its order, on the general principle of *audi alteram partem* (hear the other side) Cf *Raja Debi Baksh v Habib Shah* 17 C W N 892, also read the cases under the heading "Notice" under sec 19 *infra* Also *Re Subrati Jan* 38 Bom 200 No language can be too strong to condemn the inveterate practice of the Maffusil Courts of making *ex parte* orders to the detriment of opposite parties without giving proper notice to them

Leave of Court There is no withdrawal of a bankruptcy petition without the leave of the Court The Court may grant leave for the withdrawal of a creditor's petition on being apprised of the facts and terms of withdrawal, *Re Bebro*, (1900) 2 Q B 316 *Vide* notes and cases under the heading "Withdrawal" *supra* Leave to withdraw is, in many cases, granted if there is no opposition inspite of notice Cf *Re Subrati Jan*, 38 Bom 200, but that is not a very sound principle to proceed on Even in *ex parte* cases the Court should before granting any leave, scrutinise the facts of the case and see whether the circumstances

Leave is discretionary are such as would justify a withdrawal It is always discretionary with the Court to grant or to refuse leave to withdraw, but the discretion should be exercised in a judicial manner with reference to the merits of each individual case Such leave should be refused to a petitioning creditor if the withdrawal prayed for is detrimental to the interests of the other creditors Leave to withdraw may be granted to a debtor who has satisfied his just creditors although creditors, whose claims are disputed and are not *bona fide*, oppose the grant of such leave, *Tulsidas Lalubhai v Bharat Khand Cotton Mills* 39 Bom, 47

15. [§ 8] Where two or more insolvency petitions are presented against

Consolidation of petitions

the same debtor, or where separate petitions are presented against joint debtors, the Court may consolidate the proceedings or any of them, on such terms as the Court thinks fit

The Section This is old sec 8 and corresponds to sec 110 of the English Bankruptcy Act, 1914. It should be noticed that the section contemplates only insolvency petitions against the debtor or debtors and not those by him or them. Therefore it cannot be called in aid to justify a plurality of petitions by the same debtor or the consolidation of separate petitions filed by the joint debtors or the consolidation of the debtor's petition with that of the creditor. See *Ex parte Haines* 3 De G & J 58 27 L J Bk 33. In this connection vide also the notes under sec 30 *infra* also see *Ex parte Mackenzie* (1875) 20 Eq 758. The language of the section seems to suggest that the section is confined to petitions presented in the same Court but such a restricted interpretation would lead to obvious injustice, and in that respect the language of the section is faulty.

The object of this section is to minimise the expenses and troubles of the parties to insolvency proceedings as well as to economise public time. It prevents multiplicity of proceedings and saves the debtor from unnecessary harassments.

Petitions founded on different acts of insolvency may be consolidated. Thus where the members of a partnership business become insolvent at different times, proceedings against them may be consolidated, *Re Greaves Ex parte Official Receiver* (1904) 2 K B 493, see also *In re Abbott* (1894) 1 Q B 442 *Hardian v Shamsundar*, 69 P R 1888, *Maharaj Mall v Hira Mall* 37 P R 1897. In consolidating several petitions it may be necessary to transfer a case from one place to another. Thus in *Re Stick Ex parte Martin*, (1886) 3 Morr 78, one petition was presented at Swansea the place of business of the insolvent and another in London. The Court directed the transfer of the London case to Swansea. As to the power of transferring insolvency cases, vide notes at p 48 *ante*.

The Debtor has no *locus standi* to oppose consolidation

A debtor has no right to oppose an application for consolidation, see *Ex parte Mackenzie*, 20 Eq 758 (-61), *supra*.

Separate petitions against joint debtors According to some opinion the Act does not permit a single petition for adjudication against several joint debtors though when separate applications are filed against them they can be consolidated under this section. As to whether a joint application can be maintained against several persons see *Kali Charin v Harimohan*, 31 C L J 206 24 C W N, 461 58 I C 531. It has been held that a joint application by several judgment debtors to be adjudged an insolvent is not allowable *Sarada Prosad v Ram Sukh* 2 C L J 318 Cf *Ghulam Haidar v Mogal Sen Desraj* A I R 1926 Lah 235 98 I C 425. The

Madras High Court has however ruled that a single application may be made by a creditor against the members of a joint Hindu family to declare them insolvents if there is a joint act of insolvency. The real test in such a case is whether, if the application is treated as a suit it would be bad for multifariousness. *Boliseti Mamayya v Kolla R Rice Mill Co* 44 Mad 810 40 M L J 570 (1921) M W N 330 29 M L T 288 14 L W 428 63 I C 916. Following this case the Rangoon High Court has held that a single petition in insolvency may be filed against a Burmese and his wife if they are jointly indebted to the petitioning creditor and have committed a joint act of insolvency, *Maung Kyi Oh v Arunachalam* 2 Rang 309 A I R 1925 Rangoon, 36 84 I C 968. In *Alamuri Punniiah v Firm Sagarajee Kasarmal*, 51 M L J 12 (1926) M W N 983 24 L W 867 A I R 1927 Mad, 174 99 I C 185—a case of joint partners—the learned Judges have gone a step further and held that if the test laid down in 44 Mad 810 be fulfilled a joint application may be maintained even in the absence of a joint act of insolvency. For another case of partners see *Khookwat v Wool Tail*, 19 Cal, 223 (P C). In this connection see also *Vital v Ram Chandra* 19 N L R 128 A I R 1923 Nag 257 72 I C 327 and the provisions of sec 79 (2) (c) under which the debtor can be a firm.

16 [§ 9.] Where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of a petitioning creditor.

Power to change carriage of proceedings

N B —This is old sec 9 and corresponds to sec 111 of the English Bankruptcy Act 1914, as amended in 1926.

The Section This section empowers the Court to substitute one creditor for another when the latter does not proceed with his insolvency petition with due diligence. The principle underlying this rule is that the petitioning creditor is supposed to apply not only for his own benefit but for the benefit of the creditors generally. He is supposed to be pledged to support the proceeding in all its stages see Robson p 227. The word "petitioner" in this section obviously refers to a petitioning creditor. The expression "any other" before the word "creditor" makes it abundantly clear. But the substituted creditor must fulfil the requirements of sec 9 that is the debt due to him must amount to Rs 500 and must be a liquidated sum and he must come within three months of the act of insolvency relied on. No order can be made

under this section, the effect of which would be to extend the period of three months from the date of the act of insolvency, *Ex parte Maugham*, (1888) 21 Q B D 21 5 Mor 152 Cf *In re Maund* (1895) 1 Q B 194 43 W R 207, but the Rangoon High Court is of opinion, that if the original creditor's petition was validly presented, no question of fresh act of insolvency would arise upon substitution under this section, *Sathappa v Chetty Firm*, 7 Rang 785 AIR 1929 Rang 291 122 IC 285 According to this case the effect of substitution is that the substituted creditor takes the place of the first petitioning creditor *ab initio* and is entitled to prosecute the original petition as if it were his own petition This seems to be a very sensible view, because the object of the section seems to be to prevent other creditors from being injured by the action of one creditor who by reason of collusion or otherwise, may not diligently prosecute the petition If the substituted creditor's petition be regarded as a new proceeding this object will be frustrated see *Dinavati Venkata Hanumantha v Gangayya* 51 Mad 594 (1928) MWN 391 55 MLJ 168 AIR 1928 Mad 608 110 IC 611 So it follows that the substituted creditor's debt need not be actionable on the date of substitution it is quite enough that it was actionable and not time barred on the original date *Ibid*

Ordinarily the original petitioning creditor has the carriage of the proceeding so it is he who must have the notices properly served at his own expense and bring the petition to hearing *Dasagopal v Bhanji* 25 Bom 161 But if such creditor is colluding with the debtor this section will enable the Court to proceed with the insolvency matter, as in the interest of the commercial morality of a country, the Court ought to move in a matter

Procedure on substitution

like this and enforce strict trade honesty It seems that in cases where the debtor does not appear fresh notices should be issued to the debtor upon substitution of one creditor by another under this section Lord Cairns thus observes in *Re Bristow* L R 3 Ch 247 "It would be contrary not only to the first principles of bankruptcy law, but every forensic proceeding that we are acquainted with where you are proceeding upon notice that you should, in the absence of appearance and before appearance entirely shift the foundations of the case upon which you are proceeding"

17. [§ 10.] If a debtor by or against whom an insolvency petition has been presented dies the proceedings in the matter shall

Continuance of proceedings on death of debtor

unless the Court otherwise orders, be continued so far as may be necessary for the realisation and distribution of the property of the debtor

Change of Law This is old sec 10 with the addition of the clause 'So far as may be necessary for the realisation and distribution of the property of the debtor' This amendment makes it clear that the object of continuing proceedings on the death of the debtor is for the purpose only of realising and distributing his property"—*Notes on Clauses* See *Venkatarama Iyer v Official Receiver* *infra* also sec 112 of the Bankruptcy Act, 1914 as amended in 1926

Object and Scope of the Section The object of the section is to render the realisation and distribution of the insolvent's estate possible notwithstanding his death, *Narain Singh v Sur Baksh Singh* 9 Lah 306 29 Punj L R 399 AIR 1928 Lah 119 107 IC 281 It should be noticed that although death places the debtor beyond the jurisdiction of the Court still the Court retains some control over his estate for the purpose of discharging his liabilities Under ordinary circumstances the estate of a deceased person passes to his heirs but in the case of a deceased bankrupt what really passes to the heir is really the excess if any, of the deceased's assets over his liabilities This section gives effect to this legal fiction Cf *Administrator General v Official Assignee* 32 Mad 467 (464) The section applies only where a debtor dies during the pendency of a bankruptcy proceeding, it does not contemplate the death of a debtor before the commencement of the bankruptcy proceeding

Death of Insolvent This section corresponds to sec 108 of the English Bankruptcy Act, 1883 and provides that after an insolvency proceeding has once been started the proceeding will not be terminated by the death of the debtor, *Lachman Das v Jai Sing* 4 Lah, L J 262 1922 Lah 399, or in other words it will not *abate* by reason of the insolvent's death so that notwithstanding his death pending the hearing of the insolvency petition a debtor's assets may be available for distribution among his creditors, see *Venkatarama Aiyar v Official Receiver* 51 Mad 344 54 M L J 585 (1928) M W N 237 AIR 1928 Mad 476 109 IC 94—following *In re Walker* (1886) 54 L T 682 After the death of the insolvent his personal representatives may be substituted and brought on the record } *Ram Jas v Kantha Sing* 14 P W R 191 59 IC 51 But this does not mean that the heirs of a deceased debtor can be adjudicated insolvent, *Re Shrinani Dhamji* 8 S L R 93 25 IC 930 The death of the father pending the insolvency proceedings does not put an end to the Receiver's power to sell the interests of the sons, *Balavenkata*

Setharama v Official Receiver, Tanjore, 49 Mad , 849 51 M L J 269 24 L W 345 A I R 1926 Mad 994 97 I C 825, F B , in fact, the Receiver is not divested of the property by the insolvent's death, *Gokal Sing v Shriram*, A I R 1925 Lah , 366 7 Lah L J 131 26 Punj L R 186 88 I C 558 , *Lachman Das v Jai Sing*, 4 Lah L J 262 A I R 1922 Lah 309 , *Re Ibrahim Lalji*, 9 I C 633 (Sind) It seems that subject to the provisions of this section the provisions of O XXII of C P Code may be applied to Insolvency proceedings because of sec 5, ante Cf *Ramjas v Katha Singh*, 9 P L R 197 14 P W R 1921 59 I C 51 supra One outstanding feature of the section should not be lost sight of , it equally applies whether an adjudication has been made or not The case of an adjudication order presents no difficulty , as in that case the estate vests in the receiver But where an adjudication has yet to be made the law works out the same effect by means of a legal theory that the deceased bankrupt's estate vests in the heirs only subject to the deceased's liabilities

This section will equally apply whether the insolvency petition be presented by the creditor or the debtor , so it has been held that when the petition is presented by the debtor it may be continued after his death , *Fakir Chand v Moti Chand*, - Bom 438 The official assignee can proceed so far as circumstances permit in the same manner as he would have done had the insolvent been living *In re Sitaram*, 10 Bom H C 58 *Pattu v Janki Prosad* 6 B L R 119 , *Re Walker*, (1880) 3 Morr 69 , *Ramathai Anni v Kaniappa* 51 Mad 495 55 M L J 235 A I R 1928 Mad 480 110 I C 167 , *Bromley v Goodere* 1 Atk 75 The representatives of the deceased insolvent are therefore entitled to appear on the records to take part in the proceedings for realisation and distribution of the insolvent estate, see *Sripat Singh v Prodyat Kumar*, 48 Cal , 87 5- I C 810 Similarly, a creditor's petition may be continued after the death of the debtor If the debtor dies before service of notice upon him, the service may be effected on his personal representatives, *Ex parte Hill and Hymans*, 10 Q B D 538 Where an application is made by a creditor for adjudicating a debtor an insolvent and the debtor dies before actual adjudication, the Judge can order the Insolvency proceedings to be continued in the presence of the heirs of the deceased debtor, *Ramesh Chandra v Charu Chandra* 34 C W N 445 , it does not matter at what stage of the proceedings the debtor dies We have seen above that it is immaterial for the purposes of this section whether the debtor dies before or after the making of the adjudication order Cf - Bom 438 , 9 I C 633 (Sind) If a Receiver has already been appointed, the death of the insolvent will not exempt the assets in his hand from distribution , the Receiver can deal with the deceased insol

vent's estate as he could while the insolvent was alive, *In re Khaja Ibrahim*, 9 IC 633 In fact, the receiver's position is not in any way affected by the death

Legality of adjudication after death

of the Insolvent, *Fakir Chand v Motichand*, 7 Bom, 438, *Hardian v Shamsunder*, 69 P R 1888 The insol

vent's death will not invalidate the proceedings, *Dulari v Mohansing*, 3 All, 759 This will be so even in cases where the legal representatives of the insolvent have not been brought on the record, *Rama Sami v Bagirathi*, 6 Mad, 180, *Sheo Prosad v Hirulal*, 12 All, 440 According to some opinion, the words, "proceedings in the matter" will include subsequent steps in connection with it, of which the earliest will be the adjudication of the insolvent, *Venkatarama Aiyar v Official Receiver supra* This view implies that the Court has jurisdiction to adjudicate a person as an insolvent *after his death* *Vide ibid*, also 51 Mad 495, *supra* This seems to be an extreme view and the wordings of the section do not warrant it, besides it is inconsistent with the ordinary juristic idea that death places a person beyond the jurisdiction of the Court

An appeal preferred against the adjudication of an insol-

Death of insolvent pending appeal against adjudication order

vent abates on his death, as such an order is purely personal to the insolvent the right to sue does not survive within the meaning of O XXII, r 4,

on the death of an insolvent respondent, *Narain Singh v Gurbaksh Singh*, 9 Lah 306 29 Punj L R 399 AIR 1928 Lah 119 197 IC 281 Cf *Hardian v Shamsunder, supra*

Administration of Estate of person dying insolvent:

Vide sec 130 of the Eng Bankruptcy Act, 1914 (in the Appendix) Also *Sloccock v Official Receiver*, (1929) 1 Ch 647

Notice on the death of the debtor See Rule vii framed by the Madras (App B) and Bombay (App D) High Courts

18. [§ 6 (1)] The procedure laid down in the *Code of Civil Procedure*,

Procedure for admission of petition

1908, with respect to the admission of plaints, shall so far

as it is applicable, be followed in the case of *insolvency* petitions

This is the latter portion of the old sec 6 (1), and says that the procedure laid down in the C P Code with respect to the admission of plaints, shall, so far as it is applicable, be followed in the case of insolvency petitions For such procedure see Orders vi and vii of the said Code This section however does

not specify which provisions of the Civil Procedure Code are exactly meant here. The clause "so far as it is applicable" is wide enough to make O. IV, rule 2, applicable to insolvency cases. So there ought to be a register of insolvency petitions in every Insolvency Court and the particulars of every petition should be entered in such register.

The section uses the general expression "insolvency petition". So the procedure prescribed in this section is to be followed whether the petition is made by the creditor or the debtor.

19. [§ 12.] (1) Where an insolvency petition is admitted, the Court shall make an order fixing a date for hearing the petition.

Procedure on admission of petition.

(2) Notice of the order under sub section (1) shall be given to creditors in such manner as may be prescribed.

(3) Where the debtor is not the petitioner notice of the order under sub section (1) shall be served on him in the manner provided for the service of summons.

Sub-sec (1) This sub-section lays down the procedure which a Court is to follow in respect of an insolvency petition after it has been admitted under sec. 18. It says that after the petition is admitted the Court shall make an order fixing a date for hearing. So when a petition complies with the requirements of the foregoing sections it has to be admitted, and after the admission the Court shall fix a date for hearing by an order. The word 'shall' indicates that it is obligatory on the Court to make an order appointing a date.

Sub sec (2) This clause is not confined to the case of a petition by the debtor and may refer to the application of both the debtor and the creditor. See *Darrah v. Faal Ahmad* AIR 1926 Lah 360 93 IC 903. But see *Ganesh Das v. Khilanda Ram* AIR 1929 Lah 636 119 IC 753. The notice of the order fixing the date must be given to the creditors and when the application is by one of the creditors the notice should be given to the other creditors as well. The word "prescribed" means prescribed by rules framed under the Act, see sec. 2 (1) (c) and sec. 20. Where a creditor files a petition to adjudicate his debtor an insolvent notice under sec. 19 (1) to all other creditors must issue under sec. 19 (2); *Muthu Karuppan v. Muthuraman* (1914) MWN, 899, 12

LW 1917 20 IC 282 private notice to a creditor in the absence of a general notice, does not validate an adjudication, *Nachiappa v Thangavelu* 3 LW 495 34 IC, 696 The Act of 1901 required the notice to be given to creditors by publication in the local Official Gazette and in such other manner as may be prescribed. But the new Act has omitted the words relating to publication in the official Gazette. So now the notice to the creditors need not necessarily be published in the local Official Gazette but is to be given in the manner prescribed by rules framed under s 79 but a mere private notice that is one not in the prescribed manner will be of no avail *Nachiappa v Thangavelu supra*. There is however nothing illegal in ordering notification being given in the local Official Gazette *Darrah v Faal Ahmad AIR 1926 Lah 360* 93 IC 903. The Calcutta and Allahabad High Courts have prescribed rules insisting on publication of the notice under this sub-sec (1) in the local Official Gazette see Rule 5 of those High Courts. Rule XXI (1) of the Madras High Court likewise makes publication in the Official Gazette compulsory. Rule XXIV (1) of the Bombay High Court does not make such publication compulsory but empowers the Court to insist on such official publication.

The notice can be served on the creditor's agent with a general power of attorney *Kalianji v Bank of Madras* 39 Mad 693 31 IC 583 29 MLJ 788.

When an order of adjudication was passed without giving notice to the creditor it was held that

the order was bad from want of notice. *Kumarasami v Gobinda* 11 Mad 136.

Or in other words want of notice vitiates an adjudication order which has therefore to be set aside *Nachiappa's case supra*. In a Calcutta case it has been likewise said that an *ex parte* order of adjudication without service of notice cannot stand *Hool Chand v Sarjoog Pershad* 7 CLJ 268 sc 12 CW N 273.

Notice Notice to a creditor under this sub-section need not always be served personally. It may be sent per registered post. If the notice was put under a cover properly addressed and was put into the Post Office a presumption will arise that it reached its destination according to the regular course of business of the Post Office and was received by the person for whom it was meant. This presumption will be stronger when the sender takes the additional precaution of registering it, see *Hanhar v Kamshashi* 29 CLJ 117 (PC) 25 CW N 77. If the registered cover comes back with an endorsement of refusal to accept on the part of the addressee there will be a presumption under sec 114 of the Evidence Act that the notice

reached the addressee and his refusal to accept will set the doctrine of constructive notice against him, see *Girish Chandra v Kishori Mohon*, 23 C W N 319. As a matter of practice notice to the creditors must be given under this sub-section, see *Jeer v Rangaswami* 36 Mad, 402, but it should be noticed that non service of the notice upon a creditor has not been mentioned in sec 25 (2) as a ground for dismissing the debtor's application, though non-service of such a notice upon the debtor in the case of petition presented by a creditor is a good ground for dismissing the insolvency petition under sec 25 (1). As an order in favour of the insolvent may possibly affect the creditor, previous notice should always be given to the latter. It is an elementary rule of universal application that a judicial order which may possibly affect or prejudice any party cannot be made unless he had been afforded an opportunity to be heard, *Ajant Singh v Christian* 17 C W N 862. *Jagannath v Mohesh* 25 C L J 149 (152). *Rajendra v Atalbehari* 25 C L J, 456, *Satyendra Nath Sen v Nagendra Nath* 39 C L J 279.

Sub-sec. (3) This sub section obviously refers exclusively to the case where the creditor makes the petition. When the creditor's application has been admitted and a date has been fixed for the hearing of the case by an order of the Court, notice of the order has to be served on the debtor.

Note the difference in the mode of service in the two cases of sub-secs (2) and (3). When the notice has to be served by the creditor on the debtor the procedure laid down in Order V of the Code of Civil Procedure has to be adopted, but that is not so when the notice has to be served on the creditor. The reason for this difference is that the creditor will not be so much affected as the debtor if the order of admission of the petition be not communicated to him. So it has been provided in Sec 25 (1) that when the Court is not satisfied with the proof of the service on the debtor of the notice of the order admitting the petition, the Court shall dismiss the petition. The provision as to service upon the insolvent under this clause is imperative and omission to do so may possibly vitiate the whole proceeding. *Nathmull v Gonesh Mull* 34 C L J 140. The section contemplates a personal service on the alleged insolvent and substituted service is permitted only if personal service cannot be effected. *Ibid*. Cf *Re Blackman* (1807) 6 Morr 15.

When the objector had no notice of the application for insolvency, he is entitled to apply under sec 108 (Order IX r 13) to set aside the *ex parte* order. *Mool Chand v Sarroog* 7 C L J 268 sc 12 C W N 273. This case has been apparently decided without reference to an earlier decision which has laid down that Order IX r 1 does not apply to the setting aside of an insolvency order. *Sri Chandra v Mahon*.

Hossein 8 C W N 468 When the objector has got notice, but there has been for some reason or other an *ex parte* order, the objector can proceed by review, 7 C L J 268 But a Court has inherent jurisdiction to set aside an insolvency order if it was obtained by fraudulent representation or for want of jurisdiction, *Sarat Chandra v Mahomed Hossein*, 8 C W N 468 at p 470, also *Ramkamal v Bank of Bengal*, 5 C W N 91

20. [New] The Court when making an order

admitting the petition may, and where the debtor is the petitioner ordinarily shall, appoint an interim receiver of the property of the debtor or of any part thereof, and may direct him to take immediate possession thereof or of any part thereof and the interim receiver shall thereupon have such of the powers, conferable on a receiver appointed under the Code of Civil Procedure 1908 as the Court may direct If an interim receiver is not so appointed, the Court may make such appointment at any subsequent time before adjudication and the provisions of this sub section shall apply accordingly

The Section This section is practically new though there was a provision for *interim* receiver in sec 13 (2) of the Act of 1907 It is analogous to Sec 16 of the Presidency Towns Insolvency Act (Act III of 1909) and sec 70 (2) of the Bankruptcy Act 1883 Its object is to give the Court sufficient control over the insolvent's property between the dates of the presentation of the petition and the adjudication order, and to prevent all attempts on the insolvent's part to dispose of his property to the detriment of his creditors or otherwise protect the insolvent's estate so that the creditors may have the fullest benefit of the insolvent's assets *Madhu Sardar v Khitish* 42 Cal 289 s c 30 I C 82 The discretion given to the Court under this section to appoint an *interim* receiver should ordinarily be exercised only in cases where the property of the alleged absconding insolvent has to be preserved from destruction or disappearance and not in order to vest in an *interim* receiver the properties attached by other Courts in execution *Bashyam Reddi v Soma Sundaram* 3 L W 250 32 I C 897 Compare the provisions of O XL, r 1 of C P Code By virtue of the provisions of sec 5 of this Act read with those of sec 151 C P Code the Appellate Court too when the proceeding is dragged before it in appeal can appoint an *interim* receiver, just in the manner it can appoint a receiver under

O XL, r 1, C P Code Cf *Abdul Razak v Basiruddin*, 14 C W N 586, *Abdul Rezak v Basiruddin*, 17 C W N 405 also 40 Cal 678 The effect of appointing an *interim* receiver is to deprive the debtor of his *control* over his property and not to deprive him of its *ownership* The debtor is not divested of his property, notwithstanding the appointment of an *interim* receiver, he still continues to be the owner of his property It is only when an actual order of adjudication is made that the ownership passes away from him to the receivers, *Ram Saran v Shiva Prosad*, 58 I C 783 (Pat) The effect of appointment of an *interim* receiver is, however, to take away the *possession* of the property from the debtor, so it interferes with his power to enter into transactions to bind the estate in the hands of the receiver, inasmuch as the receiver's possession will operate as notice, see Explanation II of sec 3 of the Transfer of Property Act, and any transferee from insolvents only takes subject to the receiver's rights, cf *Re Tele*, (1912) 2 K B 367

Receiving Order It should be noticed that this section practically makes provision for what is commonly called a "receiving order" in sec 5 of the English Bankruptcy Act, 1883 A *receiving order* is an order of the Court of Bankruptcy placing the estate of the insolvent under the custody and control of the Court through its officer, Halsbury's *Laws of England*, Vol II, p 56 The English Courts maintain a double system in respect of the debtor's property As soon as an insolvency petition is presented a receiving order is made whereby the insolvent is deprived of the *control* over his property, though the property remains *vested* in him Then follows the order of adjudication altogether determining the insolvent's ownership In the Act of 1907, this double system did not find favour with the Legislature, as the Indian litigants might use it as a legal machinery for oppressing their adversaries But the utility of this practice has now been felt and it has been "considered desirable that an *interim* receiver should normally be appointed when the petition is admitted and should be armed with such of the powers conferrable on a receiver under the C P Code as the Court may direct" (See notes on Clauses to the Bill as originally proposed) So here we have got this new section which virtually provides for the making of a receiving order though the Act does not make use of that expression In fact, the Select Committee repudiated the existence of the system of making *receiving orders* under the Indian Law We have thus the following note of the Committee in the *Notes on Clauses* published (on 7th September, 1918) with the original Bill No 14—"But under the Indian Law there is no receiving order procedure at all, and the or

of adjudication is made on the hearing of the petition'—*Vide* notes on clause 14. The new section is virtually a preliminary step for the introduction of a regular receiving order system. The only difference that now exists between the English and Indian systems is that here the making of a receiving order is left to the discretion of the Court.

The receiving order should usually be made in the case of a petition by the debtor and in the case of a petition by the creditor it is left to the discretion of the Court. From the use of the words may and shall in the section it is obvious that there is greater obligation on the Court to appoint an *interim* receiver where the application is by the debtor than where it is by the creditor. The word *ordinary* qualifies the word *shall* and the effect of this qualification is that the latter word loses its imperative character. So in an English case it has been maintained that the Court is not obliged to make a receiving order in spite of the imperative word 'shall' used in the section *Re Bond* (1888) 21 Q B D 17, *Re Betts, Ex parte Official Receiver* (1901) 2 K B 39. This non obligatory nature is also apparent from the concluding sentence of the section which permits the making of a receiving order *at any subsequent time*.

Powers and status of the Interim Receiver The powers of the *interim* Receiver were not defined under sec 13 (2) of the Act of 1907. This defect has been removed under the present Act. An interim Receiver may exercise such of the powers conferable on a receiver appointed under the C P Code as the Court may direct, *Kaliaperumal Naicker v Kamlandra* 53 M L J 142 (1927) M W N 245 26 L W 11 AIR 1927 Mad 693 102 IC 444 Cf 50 M L J 39 93 IC 271 *infra*. The Court appointing an interim Receiver may mention which of the acts mentioned in O XL r 1 (d) will apply to him. Besides the provisions of sec 56 of the Insolvency Act will as far as practicable apply to an *interim* receiver. For the powers of a receiver under that section *ide post*. An interim Receiver may be directed to take immediate possession of the insolvent's properties but subject to the condition in the proviso of sec 56 (3) and in Art 1 (2) of C P Code 1908 see *E D Sasson v Moosaji* 9 IC 485 (Sind) *Madhu Sardar v Kshitish Chandra* 42 Co 89 50 IC 87. But it seems that an *interim* receiver is not competent to apply for delivery of property under sec 5 of the Act *ide* 6 IC 380 s c 95 IC 705 94 IC 176 (Mad). It is only when the *interim* receiver has taken possession of the debtor's properties that he can become clothed with the powers of a receiver appointed under the C P Code *Sulramani Aiyar v Official Receiver Tanjore* 50 M L J 65 23 L W 300 AIR 1926 Mad 457 93 IC

877 This is evident from the use of the word "thereupon". Though the *interim Receiver* may have wide powers conferred on him, yet the *regular receiver* when appointed after adjudication does not stand in his shoes. He stands on a very much higher footing. The *regular Receiver* has the insolvent's property vested in him, whereas the *interim receiver* can merely hold possession thereof, *Ramsaran Mandar v Sita Prasad*, 58 IC 783 (Pat). In a Madras case, it has been held that an *interim Receiver* cannot be held to be "owning property" within the meaning of O XXI, r 89 of C P Code (1908), see *Ramchandra, Official Receiver, Tanjore v Sankara Aiyar*, 50 MLJ 239 (1926) MW N 159 23 LW 145 AIR 1926 Mad 357 93 IC 271. Although an *interim receiver* cannot make an application under O XXI, r 89, still it seems that he can apply under O XXI, r 90 of the C P Code, inasmuch as he can be called a person *whose interests are affected by the sale*, *Subramania v Dhara puram*, (1928) MW N 216 AIR 1928 Mad 454. An *interim receiver* can be directed to collect evidence as to assets of the insolvent, but he cannot pass a final order in a claim by a creditor to a property. *Gobardhan Das v Jagat Narain* AIR 1926 Pat 134 94 IC 506. Where an *interim receiver* is not clothed with the powers to take possession of the insolvent's property, the Court has no jurisdiction to hand over the property to him under sec 52, *Irunachellam Chettiar v Narayana Naicker*, 23 LW 513 94 IC 126. This disability entails the further consequence that when the *interim Receiver* applies to the Court to stop the sale of the debtor's properties to be delivered to him, the Court may not stop the sale or direct the delivery of the properties to him, *as he is only an interim Receiver not in possession of the debtor's estate*, *Subramania Aiyar v Official Receiver Tanjore*, *supra*. A Receiver appointed under this Act, is a public officer within the meaning of sec 2 cl 17, of C P Code, and therefore, a notice under sec 80 of the C P Code is a condition precedent to the institution of a suit against him, *Inna Patricia v Goind Bahant*, 50 IC 411.

Duties of Interim Receiver The *interim Receiver* is to maintain the insolvent estate in such a position that should the debtor be finally adjudged insolvent, there be no diminution of the estate in the interval, while at the same time no damage is done if the application for adjudication fails. *Firm of Adamji v Firm of Basno*, AIR 1926 Sind 77 50 IC 330.

21. [§ 13.] At the time of making an order admitting the petition or at any subsequent time before adjudication the Court may

Interim proceedings
against debtor

Darrah v Iazal Ahmad AIR 1926 Lah 360 93 IC 903. What is reasonable security it will be for the Court to determine. Cf *Re Bhuvan Mohan* 15 WR 571, but the Court should not determine it on arbitrary, but on sound judicial principles. If the security is such as will induce the debtor to appear it will be considered reasonable. The security should not be extremely extravagant as in that case it may not be possible for the debtor to give any security at all. In determining the security regard should always be had to all the surrounding circumstances, e.g. the character and position of the debtor, the amount at stake, inducements for non appearance, means of the debtor and so forth. It should never be lost sight of that the whole object of the security is to enforce the attendance of the debtor and not to place him in an embarrassing situation.

The proper mode of enforcing a security bond (for the attendance of the insolvent) is to get an assignment of the bond with a view to suing on it, *Mingale Antonee v Ram Chandra* 19 Bom 694 see also *Poynor Bibee v Nujjo Khan* 5 Cal 43. *Moidin v Chandu* 7 Mad, 273. Consequently, it has been held that the assignee of a security bond (in favour of the District Judge) for the production of a judgment debtor when called upon to appear, is entitled to maintain an action upon the bond. *Gopinath v Benode* 31 Cal 167. Compare all these cases with sec 145 of the present C P Code which lays down that the security can be enforced by execution against the surety and overrides all previous opinion regarding the matter. Cf also *Nachiappa Cheltiar v Kandappan Cheltiar* (1926) 11 WN 612. The obligation of a surety is discharged by the death of the debtor before the stipulated time. *Krishnan Nayar v Itinan Nayar*, 24 Mad, 637. So where an undertaking is given by a surety (under section 554 C P Code) that the judgment debtor would apply in insolvency within 30 days and that he would appear in Court whenever required but the judgment debtor died within the said time it was held that the surety was thereby discharged and the decree holder lost his remedy against him, *Valin Chandra v Mirtunjoy* 41 Cal 50 17 CWN 1241. Applying the principle of this case it must necessarily follow that the surety will be discharged under this section (sec 21) if the debtor dies before the contemplated final orders.

The money deposited by the surety as security for the production of the debtor is for the benefit of the creditor, so upon failure of the surety to fulfil his undertaking, it becomes payable to the creditor and the Court cannot declare a forfeiture thereof in favour of the Government, *Basant Lal v Chhed Singh* 39 Cal 1048 16 CWN 664. Cf *Re Gordon*, (1901) 2 KB 164. Halsbury Vol II, p 75.

A covenant by a surety that he will pay Rs 500 if he fails to produce the insolvent who is required by the Court is absolutely legal and an action can be founded upon it within three years from the date of his failure to produce *Mir Ansar Ali v Guru Churn* C L J 419, see also *Janki Das v Ram Partab* 16 All 37.

Clause (2) This clause makes provision for *interdictum* attachment. This is the only section which speaks of attachment by the Insolvency Court. The attachment referred here is quite different from an attachment contemplated in sec 64 of C P Code. Under that section attachment means a sort of sequestration of the property with a view to preventing private alienation. But here it is something more than that. It is here practically taking over of the property and the custody of the Court. That is why an attachment under this clause should always be by *actual seizure* as the sole object of the attachment is to prevent the insolvent from dealing with his property to the detriment of his creditors.

Hasmat Bibi v Bhagwan Das *infra*. The property attached must be one in the possession of or under the control of the debtor and it does not matter whether the debtor be the owner of it or not. Non attachable property cannot be seized. There is however one exception to this rule in favour of the debtor's account books which though not attachable under sec 60 of the C P Code can be seized inasmuch as they are absolutely indispensable for the purpose of ascertaining the assets of the debtor. See sec 28 (5) and the notes thereunder. Compulsory deposits in Provident funds and trust properties are non attachable properties within the meaning of the section. *Vide* notes under the heading "Property" at p 15, *ante* and under sec 28 (2) and (5). As to whether Mitakshara joint family property and ancestral estate will be attachable property within the meaning of this section, *vide* the cases cited at p 17 *ante*. An attachment under sec 21 (2) is strictly analogous to an attachment *before judgment*. So when an attachment is made under this clause, an appeal may be preferred or an objection may be made to such attachment under Or XVI r 58 of the C P Code, 1908 and then the Court is bound to hold an investigation into the matter. *Hashmat Bibi v Bhagwan Das* 16 All 60, 2 A I J 24, 24 I C 252. *Vide* also the notes under sec 40 *ante* under the heading "The Section applies in Civil Cases". Cf *Munir Choudh v Hashmat Bibi* 30 I C 307 (Nag). An order of attachment hereunder when passed by the District Judge exercising original jurisdiction is appealable with leave see 36 All 65, *supra*.

Appeal

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Appeal

Clause (3) The Court can *suo motu* or on the application of the creditor also order interim arrest and imprisonment of the debtor and also order when the debtor is so arrested or imprisoned his release on his furnishing proper security Cf *Aman Singh v Imperial Bank*, AIR 1929 Lah 808 As to the power to issue a warrant for the purpose of arrest see *Reg v Northallerton County Court Judge* (1898) 2 QB 680 s c (1899) AC 439 and as to whether a door can be broken open in order to effect the arrest see *Re Lion Heissenfeld* 9 Mor 30 The release contemplated in this clause must be only from the interim arrest and imprisonment herein provided for The debtor cannot be released under this clause when he is arrested in execution of a decree *E S Sassoon v Kishen Chand* (1910) PLR 30 Similarly when a debtor who is arrested and committed to prison applies for insolvency he cannot be released under this clause as arrest and imprisonment are not by virtue of an interim order under sec 21 (3) In *re Haji Umar* 4 SLR 4 IC 606 The word "release" presupposes arrest or imprisonment it does not mean an anticipatory protection order Cf *Abdul Razah v Basiruddin* 14 CWN 586

Proviso No order under clauses (2) and (3) shall be made unless the Court is satisfied that the debtor with intent to defeat or delay his creditors or to avoid the processes of the Court has committed any of the acts mentioned in sub-clauses (i) and (ii)

The provisions in clauses (2) and (3) are extreme steps against the debtor and may cause great hardship to him So before taking these steps the Court must be satisfied that there is just reason for doing so The Legislature in sub-clauses (i) and (ii) lays down the contingencies in which such extreme procedure can be justified and in that connection see the following cases *Reg v Northallerton County Court Judge* (1898) 2 QB 680 (*supra*) *Ex parte Gutierrez*, (1879) 11 Ch D 298 There is no absconding or removing within the meaning of this proviso where a foreigner after temporary sojourn here returns home *ibid*

Sub-clause (ii): Such particulars as aforesaid This refers to the particulars mentioned in clause (2) above namely the non attachable properties excepting the account books

22 [§ 43 (1)] The debtor shall on the making of an order admitting the petition produce all books of account and shall at any time thereafter give such inventories of his pro

Duties of debtors

uch lists of his creditors and debtors debts due to and from them res submit to such examination in respect arty or his creditors, attend at such the Court or receiver, execute such and generally *do all such acts and lation to his property* as may be re he Court or Receiver, or as may be

Law This section corresponds to section Act of 1907. But two new changes have been

Under the old Act the duties mentioned in ild be performed at any time, *whether before aking of an order of adjudication*, but under ction the books of account must be produced t course as soon as the insolvency petition is as regards the other duties (such as furnishing ts etc), the Court can require the debtor to at any time after the admission of the petition, a discharge will not relieve the bankrupt from to perform the duties, *Ex parte Waters*, (1874)

2) The section appears to be of general appli tive of the consideration whether the creditor is petitioner, *Ganesh Das v Khulanda* A I R

6 Under the former Act the insolvent was

in the realisation of his property but as there is no question of realisation till adjudication, the present Act uses more general words, viz "Do all such acts and things in relation to his property" The reasons for these two changes have been thus stated in the *Notes on Clauses* "Apparently the duties imposed on the debtor by sub-section (1) of section 43 arises as soon as the Court has made an order under section 12 (1) [Present sec 19] It seems desirable to make this clear. It is difficult to see how the debtor can be under any obligation to assist in the distribution of his property, unless he is adjudged an insolvent. It is proposed therefore to amend the concluding part of sub-section (1), and to relegate to a separate sub-section the provisions which impose on the debtor the duty of aiding in the distribution of his property" Cf sec 28 (1) *post*. As to the meaning of the term "prescribed" see sec 2 (1) (c) under which it means 'prescribed by rules made under sec 79'

This section prescribes certain duties, which the debtor is bound to perform on the peril of being convicted under sec 69. Sec 43 of the Act of 1907, consis

Sections—the first sub section prescribing the duties and the second prescribing the penalties for non performance of the same. The first sub section is the present sec 27. The second sub section has been embodied with considerable modifications and alterations in sec 69, *ide post*.

The duties imposed by the provisions contained in this section are of a disciplinary character and if the debtor fails to carry them out the person if any, who is really aggrieved is the Court and not any person who sets the Court in motion *Palaniappa v Subramanian*, (1920) MWN 135 S M L J 358 54 IC 40 (A breach of any of the above duties is a mere disciplinary offence towards the Court and not an offence against the general criminal law) *Ladu Ram v Mahabir Prosad* 59 All 1-1 37 IC 996

Books of Account The first duty of the debtor is to produce all his books of account. The account books should be produced as soon as the insolvency petition is admitted. Cf *Re Gopaldas Aurora* 30 CWN 173 AIR 1976 Cal 640 94 IC 93. It will be seen that though the books of account are not attachable under cl (d) of the proviso to sec 60 of the C P Code 1908, yet for the purposes of insolvency proceedings they are not allowed to rank with other non attachable articles see sec 13 (1) (c) (iii) and sec 21 (b). The reason for this difference is that these account books are absolutely indispensable for the purpose of ascertaining the assets and liabilities of the debtor, so the exemption allowed in favour of the other non attachable article has not been extended to them. Under the Act of 1907, the debtor was to perform all the duties mentioned in this section at any time before or after the making of an order of adjudication. Cf *Iday Chand v Ram Kumar*, 12 CLJ 400 15 CWN 213. A change has now been introduced in this new Act in that respect the account books are to be produced on the admission of the petition and the other duties can be performed at any time thereafter. For badly keeping accounts see 25 M L J 331.

Inventories, Lists Etc Filing inventory of his properties and lists of debts due to and from his creditors and debtors are the other duties of the insolvent. But these duties need not be performed on the making of the order admitting the petition it will be sufficient if they be performed some time thereafter. It is unfair on the part of the Court to order the debtor in every case to file inventories of his property and list of debts due from them to others, without petitioning creditors having first established their right to present the petition. In the absence of circumstances to justify such an

order it is necessary for the Court to proceed under sec 24 by calling upon the petitioning creditors to establish their rights to present a petition before taking any other action against the debtor [Cf *Ganesh Das v Khulanda*, AIR 1920 Lah, 66 119 IC 753] Failure to file an inventory is a disciplinary offence, and a creditor can ask for the commitment of the debtor on that account, *Palaniappa v Subramania*, 38 MLJ 338 (1920) MWN 135 54 IC 740 See also *Darrah v Faral Ahmad* AIR 1926 Lah, 360 93 IC 903, which says that the whole matter is entirely in the discretion of the Court and the High Court should not interfere with such discretion in second appeal The words *debts due to and from* cover all debts whether the time for payment has arrived or not, *Ex parte Kemp*, (1874) 9 Ch D App 383

Submit to such examination It should be noticed that the duties mentioned in this section are all intended for the better realisation and distribution of the assets of the debtor So, he can be asked to do only such acts as will conduce to that purpose He cannot be asked to add to the value of his property A debtor cannot be compelled to employ his personal labour for the benefit of the estate, *Ex parte Lloyd, Re Jones*, (1891) 64 L T 803 8 Morr 192

The Insolvency Court has jurisdiction to order the attendance of any person though residing more than 200 miles away for his examination touching his estate and effects, and dealings and transactions, *In re Cauasji*, 13 Bom, 114 See also *Re Ganeshdas Pandalar*, 32 Bom, 198, *Re Naroraji Sarabji* 33 Bom, 462

Court or Receiver The duties enumerated in this section may be enforced of the debtor by the Court, or the Receiver if there is any So, after admitting the petition the Court may demand inventory of the debtor's property and lists of debts due to and from his creditors and debtors, *Darrah v Faral Ahmad*, AIR 1926 Lah 360 93 IC 903 As soon as a Receiver is appointed it is the duty of the insolvent to attend on him at his office and receiver should ascertain the state of the insolvent's affairs from a personal interview This can be done by asking the insolvent for inventories and by personal examination of the insolvent with respect to his profits See *Ex parte Cronmire*, (1894) 2 QB 246 In the matter of enforcing the performance of the above duties, the Receiver possesses the same power as the Court An order directing attendance need not be in writing, Cf *Churamull v Official Assignee*, 47 Cal, 56

Penalty for non-performance of the duties Such non-performance may involve the insolvent in grave consequences If the non-performance is *wilful*, the insolvent is

liable to punishment under sec 69 with imprisonment which may extend to one year. Thus in *Origanli v Desikachari* 36 M L J 61 wilful disobedience on the part of the insolvent of the Court's order directing him to perform some of the duties was followed by an order of commitment for contempt of Court. But before taking action for the insolvent's contumacy the Court should afford all possible facilities to him to explain his conduct. *Sukhlal v Official Assignee, Calcutta* 34 C L J 351. The section does not say if non compliance with the provisions hereof will render the insolvency petition liable to be dismissed but in the event of such non compliance a strong presumption may arise under sec 114 of the Ind Evidence Act quite adverse to the insolvent see *Laxmi Bank v Ramchandra* 46 Bom, 75 24 Bom L R 292.

23 [New] (1) At the time of making an

Release of debtor

order admitting the petition or at any subsequent time before adjudication the Court may if the debtor is under arrest or imprisonment in execution of the decree of any Court for the payment of money, order his release on such terms as to security as may be reasonable and necessary.

(2) The Court may at any time order any person who has been released under this section to be re-arrested and re-committed to the custody from which he was released.

(3) At the time of making any order under this section the Court shall record in writing its reasons therefor.

Nature and Object This section is new and its object is to empower the Court to grant suitable protection to the insolvent who is under arrest or imprisonment in execution of a money decree pending the hearing of his insolvency petition and prior to adjudication. Formerly, such protection could be given by the Court in the exercise of its inherent power see *Abdul Raak v Basiruddin* 14 C W N 486 11 C I J 435. But this Act makes a distinct provision for the purpose. Read Sir George Lowndes's speech explaining the object of the section ante. The power to grant interim protection to or release the debtor is however discretionary with the Court but where it refuses to grant such protection it must record its reasons. *Vandlal v Nath Mull* 3 Pat 543 A I R 1921 Pat 559 83 I C 877. The procedure recommended by this section is a temporary one pending the adjudication order,

whereafter section 31 will apply, *Ibid* Though the section would better fit in with the case of a bankruptcy petition at the instance of a debtor, still there is nothing in the section to limit its operation to the case of a petition by the debtor

Clause (1): Release The section enables the Insolvency Court to order the release of a debtor who is under arrest or imprisonment in execution of a money decree passed against him by any Court. Before directing such release, the Court can however ask for such security from the debtor as it thinks fit. The order of release under this section may be made at any time between the dates of admission of the petition and the adjudication order. Here we have a distinct provision giving the debtor what we may call *ad interim* protection. But such protection can be given to the insolvent only if the requirements of this section are fulfilled that is to say, only if the debtor is under arrest or imprisonment in execution of a money decree

A question naturally arises as to whether a Court can make anticipatory *interim* order for protection before the insolvent is actually arrested. In a case under the old Act it was held that the Court in the exercise of its inherent powers could make such anticipatory order. *Abdul Razak v Basiruddin* 14 C W N 486 11 C L J 435. An inherent power to grant *ad interim* protection has been conceded also in a Madras case *Nallagatti Goundan v Ramana Goundan* 47 M L J 783 85 I C 6-- See also two learned articles at 30 C W N clxv (166) and 31 C W N viii (8). As notwithstanding *Abdul Razak's* case the Legislature has made a new provision in this section (sec 23) limiting the Court's power to grant *interim* protection to a case of actual arrest or imprisonment we are apt to think that legislative sanction has been refused to the view expressed in the aforesaid case. The inherent power may remain unaffected by anything in the C P Code under sec 151 thereof, but that does not mean that it cannot be affected by a new provision like the present sec 23. Besides it should be noted that the scheme of this Act is to abolish *automatic protection* and that the considerations which led to the conclusion arrived at in *Abdul Razak's* case do not arise under this Act. Cf sec 31 *below* and the notes thereunder. Also see *Jewraj Kharendalia v Lalbhai* 30 C W N 834 96 I C 131 which contains some valuable discussion on the matter. So it has been said that this section does not authorise a Court to pass a general *interim* order but merely to release a debtor who is already under arrest in execution of a decree. *Ghanshamdas Khatumal v Manager Encumbered Estates* *infra*. The Madras High Court is also of opinion that an insolvent is not entitled to apply for protection before adjudication unless he has been actually

arrested in execution of a decree, because there is really no necessity till then for any protection, *Sinnasami Chettiar v Aligi Goundan*, 47 M L J 530 20 L W 870 A I R 1924 Mad 893 (1924) M W N 836 80 I C 938 As to whether a person will be considered to be under arrest, if when on bail, see *Jumai v Karim Ali*, 25 All 204 Non production of account books unless for good reasons will justify the refusal of protection order, *Re Gopaldas Aurora*, 30 C W N 112

In a few cases under the old Act it was maintained that the Insolvency Court, prior to the adjudication order, could not order release of a debtor imprisoned in execution of a money decree *Kishen Chand v E D Sasson*, (1910) P R 95 - I C 351, *E D Sasson v Kishen Chand* (1910) P L R 30 Obviously these cases have lost their significance in view of the present section 23 See also *In re Haji*, 4 S L R 47 7 I C 606 for a similar view

The protection contemplated by this section can be granted only in respect of a debt or liability which is provable under the Act, *Hira Lal v Tulso Ram*, A I R 1925 Nag 77 80 I C 946 An Insolvency Court has no power to pass an order of interim protection in favour of a person arrested by a person empowered to arrest under sec 10 of the Sind Encumbered Estates Act, *Ghanshamdas Katumal v Manager, Encumbered Estates*, 22 S L R 24 28 Cr L J 194 A I R 1927 Sind, 123

Maintenance 99 I C 930 As to whether protection under this section can be obtained in respect of an obligation to pay alimony, see *Linton v Linton* (1885) 15 Q B D 239 *Re Hawkins*, (1891) 1 Q B 25 *Tokce Bibee v Abdul Khan* 5 Cal 536, it has been held in *Re Parmanmall*, 35 I C 541 that a maintenance order to a wife by a decree is not a debt provable under the Insolvency Act Cf *Halfhide v Halfhide*, 50 Cal 867 Cf sec 41 (1) (d) *infra* A revenue officer is not a "Court" and the arrears of land revenue is not the amount of a "decree" So an Insolvency Court will have no jurisdiction to order the release of a person who has been arrested or imprisoned by an order of a Revenue Officer acting under s 45 of the Lower Burma Land and Revenue Act *Collector of Akyab v Pau Tun* 15 Rang 806 A I R 1928 Rang 81 109 I C 145

Clause (2) Under this sub section the Court can direct the insolvent released under sub-section (1) to be re-arrested and recommitted to the custody from which he has been released An order under this sub section may be made at any time after the insolvent has been released under the preceding sub-section So that he can be arrested even

Effect of Release

after the order of adjudication. The words "at any time" however do not permit re-arrest after discharge because chapter 11 makes provision only for proceedings *from acts of insolvency to discharge* see the Heading of the Chapter. Besides after discharge the insolvent can be proceeded against under section 71 only if the contingencies referred to in sec 69 take place. Under the old law re-arrest after release was not allowed, see *Re Bolaichand*, 20 Cal 874, following *Secretary of State v Judah*, 12 Cal 652. Obviously the law is different under this section, but the discretion for re-arresting after release should not be exercised except for good reasons in that behalf.

Clause (3) This clause makes it obligatory upon the Court to record its reasons for making an order under sub-sections (1) and (2). Cf *Nand Lal v Nathmull* cited at p 130, *ante*.

24 [14.] (1) On the day fixed for the hearing of the petition or on any subsequent day to which the hearing may be adjourned the Court shall require proof of the following matters namely —
 Procedure at hearing
 (a) that the creditor or the debtor as the case may be is entitled to present the petition

[New] *Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts be required to furnish only such proof as to satisfy the Court that there are prima facie grounds for believing the same and the Court if and when so satisfied shall not be bound to hear any further evidence thereon*

(b) that the debtor if he does not appear on a petition presented by a creditor has been served with notice of the order admitting the petition and

(c) that the debtor has committed the act of insolvency alleged against him

(2) The Court shall also examine the debtor, if he is present, as to his conduct dealings and

property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon

(3) The Court shall, if sufficient cause is shown, grant time to the debtor or to any creditor to produce any evidence which appears to it to be necessary for the proper disposal of the petition

(4) A memorandum of the substance of the examination of the debtor and of any other oral evidence given shall be made by the Judge, and shall form part of the record of the case

Scope of the Section This is old section 14 with a new proviso and corresponds to sec 17 of the Bankruptcy Act, 1883. It lays down the procedure to be followed for the hearing of the petition of insolvency. Under sec 19 when an insolvency petition is admitted, the Court shall make an order fixing a date for the hearing of the petition and cause notice thereof to be served under sub-sections (2) and (3) of that section. On the date of hearing so fixed, or on any subsequent date to which the hearing is adjourned, the Court shall require proof of the matters mentioned in clauses (a), (b) and (c) from the person presenting the petition whether a debtor or a creditor, *Bolishetti v Kolla Kottayya*, 44 Mad, 810, 40 M L J 500. It should be noticed that the scope of enquiry at the hearing is very limited, being restricted to three points only, viz: (i) the creditor's or debtor's right to present the petition—Cl (a) (ii) service of notice on an absent debtor—where the creditor is the petitioner—Cl (b) (iii) commission of an act of insolvency by the debtor—Cl (c). Added to these enquiries, there should be a public examination of the debtor, if present, under sub-sec (2) with a view to securing an early disclosure of the insolvent's properties and his general conduct. Cf *Nathoo v Ghulam Dastgir* AIR 1926 Lah 638 96 IC 424. Under the provisions of the Act, the Court before making an order of adjudication has to be satisfied that the debtor who applies for insolvency is unable to pay his debts and the creditors who appear at the hearing have the right to question the debtor as to his conduct dealings and property, *Narain Mishra v Ram Das*, 7 Pat 771 111 IC 617 AIR 1928 Pat 477. At the initial stage of an application for insolvency the enquiry should be confined merely to the question whether the insolvent is unable to pay his debts. This could very well be ascertained by finding out what are the assets of the insolvent and what are his debts. If the debts entered in the list attached are

not bogus debts and if it is found that the property which the insolvent is possessed of is not enough to pay his debts he would be entitled to present the application for insolvency under sec 1 and adjudicated an insolvent under sec 25 of the Act *Rasul Baksh v Gulat Rai* 5 O W N 776 113 I C 20. A creditor is not entitled to present a bankruptcy petition against the debtor unless the debt due to him by the debtor was a *liquidated* sum at the date of the act of bankruptcy. The fact that the debt became a *liquidated* amount at the date of presentation of the petition does not improve the situation, *Re Debtors* (1911) 1 Ch 10. In the case of a petition by the debtor to adjudicate him an insolvent no elaborate enquiry should be undertaken at the time of the adjudication into the genuineness of the debts mentioned by him in the list of his liabilities or as to his dealings with his property such as concealment or fraudulent transfer thereof. Such matters can be more appropriately dealt with after the adjudication order has been passed *Ran Lattan v Nathu Ram* AIR 1929 Lah 8 100 I C 552.

In the case of a joint Hindu Family the debt incurred by the father is binding upon the sons not by the rule of heirship but by that of survivorship therefore they are liable to be adjudicated insolvents in respect of the debts incurred by the father *Muthu Icerappa v Sita Gurunatha Pillai* 49 Mad, 217 22 L W 617 49 M L J 69 (1926) M W N 63 AIR 1926 Mad 133.

Sub-sec (1) Clause (a) The petitioning creditor or debtor—as the case may be—must prove that he is entitled to present the petition that is he must prove the commission of the act of insolvency, or compliance with the requirements as to the aggregate amount of the debt etc even if the insolvent does not appear at the hearing *Ex parte Pratt* (1854) 12 Q B D 334 339. As to the conditions on which the creditor is entitled to present the insolvency petition see sec 9, *ante*. Before making any adverse or exacting order against the insolvent at the instance of a petitioning creditor, the Court should call upon such creditor to establish his right to file the petition *Ganesh Das v Khelanda Ram*, AIR 1929 Lah, 636 119 I C 753. For the circumstances entitling the debtor to make the petition, *vide* sec 10 at p 85 *ante*. The debtor is bound to prove his inability to pay his debts, but under the *proviso* to this clause it will be sufficient if he gives only *prima facie* evidence of his such inability. He is not required to give *strict* evidence of his inability to pay. No very careful inquiry is necessary with regard to such inability. It is enough for the debtor to

for such proof as will satisfy the Court that there are *prima facie* grounds for believing his allegations, *Lashminarayan*

Aiyar v Subramania, 45 M L J 129
 Quantum of Evidence AIR 1923 Mad, 585 (1923) M W N
 328 73 IC 74 Cf *Goshain Gobind*
v Kishun Lal AIR 1924 Pat 166 69 IC 622, *Satish*
Chandra v Firm Raj Narayan, 72 IC 60 (Cal), *Bhagirath*
Chaudhury v Jamini, 8 Pat L T 84 AIR 1927 Pat 188
 101 IC 445, *Ganeshlal v Duaraka Ram*, 27 P L R 734 98
 IC 900, *Narain Mistri v Ram Das*, 7 Pat 771 AIR 1928
 Pat 477 111 IC 647 The Court need not go into an
 elaborate enquiry as to the validity or otherwise of the debts,
 it will be sufficient if it is satisfied that the debtor is *prima*
facie unable to pay *Manindra Nath v Rasiklal*, AIR 1927
 Cal 69 97 IC 464, *Racharla Narayanappa v Kondiga*
Bheemappa, AIR 1926 Mad, 494 92 IC 541 Or, in other
 words an enquiry under this section is a summary one, *Amir*
Chand v Bhag Singh 10 Lah L J 493 AIR 1929 Lah,
 49 114 IC 54 not warranting detailed investigation as to
 whether the debtor has committed acts which would render
 him liable under the penal provisions of the Act, *Perianambal*
v Narasimha 56 M L J 59, *Ram Rattan v Nathu Ram*, 109
 IC 552 If the petitioner himself deposes as to his inability,
 and the Judge does not record that he disbelieves him, that
 will be *prima facie* proof of the fact that he is unable to pay
 and the mere absence of other witnesses to hear testimony to
 the fact will not lead to a contrary conclusion, *Bholai Karim*
v Desai 6 Bur L J 14 AIR 1927 Rang 320 100 IC
 1004 *Nehal Chand v Gela Ram*, AIR 1930 Lah, 75 But
 the provisions of this section should not be interpreted in such
 a way as to reduce the requirements of the most salutary new
 provision that the debtor must prove his inability to pay his
 debts to a mere assertion or nominal proof, *Per Macpherson J*
in Narain Mistri v Ram Das, *supra* Where a debtor files his
 list of assets showing inability to pay, it is then for the creditor
 to prove affirmatively that the debtor has sufficient means to
 satisfy the debts, *Sita Ram v Hukum Chand*, 101 IC 624
 (Lah) *Vide* also the notes and cases at pp 87 89, *ante* The
 provision for a mere *prima facie*, and not strict, proof is herein
 made as otherwise it will involve the preliminary enquiry into a
 more comprehensive investigation into the entire assets of the
 insolvent and thereby entail unnecessary loss of time, see the
 Select Committee's Report dated the 24th September, 1919 The
 insolvent's ability to pay cannot be inferred from the mere
 excess of his assets over his liabilities, *Jwalanath v Parbati Bibi*,
 14 Cal 691, and it will be competent for the Court to enquire
 into the present value of the insolvent's property and decide
 whether there is *prima facie* proof of inability within the mean

ing of the proviso to Cl (a), *Satish Chandra v Firm Raj Narain* 72 IC 60 (Cal) In dealing with an application for adjudication of insolvency, the Court should enquire into the present value of the properties which are available for meeting the liabilities of the debtor and decide whether having regard to proviso (a) of this section the debtor has proved his inability to pay his debts *Gopal Prasad v Bhunekar*, AIR 1928 Nag 226 108 IC 43, (1) It is not open to a creditor to contend that the debtor was not unable to pay his debts as the value of his assets exceeds the value of his debts *Harnam Singh v Gopal Das*, AIR 1929 Lah 79 109 IC 570 *Vide* notes and cases at p 89 *ante* The mere existence of large properties is no indication of one's ability to pay as the property may not be converted into money, *Srirangachariar v Narasimha Iyer*, AIR 1928 Mad 1193 113 IC 290 The mere fact that the debtor has got properties the value of which is more than that of his debts is no ground for holding that he is able to pay his debts as the debtor may be unable to raise money to pay his debts If the debtor has no assets or if his property cannot be converted into money his statement that he is unable to pay his debts must be accepted as true, unless the Court has reason to think that all his debts are fictitious debts and he is making the application with ulterior motives, *Perianambi v Nara Simha* 56 MLJ 597 AIR 1928 Mad 1193 113 IC 290 (ibid) It is for the Court to say whether a deed of sale effected by the debtor is such proof as to satisfy it that he has no property left, *Narain Mishra v Ram Das* *supra* When the insolvency petition is made by the creditor, he can prove the amount of his debt in the Insolvency Court and a regular suit is not necessary for that purpose, *A K R M Chetty Firm v Maung Aung* 1 Bur LJ 239 1923 Rang 21 68 IC 885 A Court is bound to make enquiry as to the rights of the petitioning creditor to present the petition

Court to enquire into the amount of creditor's debts

to adjudicate the debtor as insolvent which enquiry includes an enquiry as to the existence of the debt, if a debtor denies the debt, *Hukam Chand v Ganga Ram* AIR 1927 Lah 111 99 IC

666 *Vide* also the notes and cases at pp 80 81, under the heading "Creditor that can make a bankruptcy petition"

Clause (b) This clause provides that if the debtor does not appear on the date of hearing upon receipt of the notice from the petitioning creditor, the latter is bound to prove that the requirements of sec 19 (3) have been complied with

Clause (c) The clause obviously refers to a petition by the creditor and requires him to prove the commission of the act of insolvency on which his petition is based even if the insolvent is absent The mere fact that the debtors are unable

to pay their debts amounting to more than Rs 500/ is sufficient to justify an adjudication order unless an act of insolvency is shown to have been committed by the debtor, *Jagan Nath v Ram Saran* AIR 1929 Lah 239 115 IC 419 If the insolvent does not raise any objection at the hearing on the score of the insufficiency of the proof of the bankruptcy act he will be precluded from raising any such objection on appeal *Ex parte Pratt*, (1884) 17 Q B D 334 It is not necessary for the debtor to prove an act of insolvency inasmuch as the very filing of the insolvency petition is an act of insolvency on his part under the *Explanation* to sec 7 Cf *Chhatrapat v Kharag Singh* at p 91 ante For the acts of insolvency on which a creditor can rely see sec 6 *supra* The creditor can examine the insolvent himself to prove the commission of a bankruptcy act *In re X Y* (1902) 1 KB 98 Cf *Chaitni Ram v Hannu*, 18 IC 229 (All)

Onus of Proof Under this section the Court requires proof of certain matters so the question of onus of proof necessarily arises in this connection In determining the burden of proof regard must be had to sec 102 of the Evidence Act Ordinarily each party must substantiate his own case, if his inability to do so leads to the failure of his case then the burden of proof must necessarily be on him The creditor or the debtor (as the case may be) must satisfy the Court that he has fulfilled the preliminary requirements in order to be entitled to present the petition *Mumtaz Hassein v Brij Mohan* 4 Cal, 888 Cf 40 MLJ 570 *supra* Both of them must prove that their allegations are true and where a question of good faith is involved they are acting *bona fide* *Gladstone Wyllie & Co v Hoimesh Chunder*, 25 WR 96 Cf *In re Couie*, 6 Cal 70 (2), *Re Purrell* (1895) 23 LT 224 15 R 644 If a deed of transfer is produced before a Court such a deed is *prima facie* evidence of the transfer and if the party opposing the application wants to establish that the transfer is not a real transfer but a fictitious or *benami* transfer it is for him to prove it and in the absence of such proof the Court is to presume that the transfer is a real one *Narain Mishra v Ram Das*, 7 Pat 771 AIR 1928 Pat 47 111 IC 647

Where the assets of a debtor exceed his liabilities he must show that by the sale of his interests or other realisation of his assets he would not be able to raise a sum sufficient to pay his debts in full, *Baldeo v Subhdeo*, 19 All 125 Cf 7 Pat 771

Sub section (2)

Examine the Debtor This sub-section obliges the Court to examine the debtor if he appears before it as to his conduct his dealings with his properties and his financial position, such examin

Public examination of the debtor

tion should be held irrespective of any consideration whether the insolvency application was made by him or his creditor (Cf 9 I C 45 I C 1008). It is the duty of the petitioner for insolvency to put himself in the witness box and to give a full account of his conduct dealings and property in the presence of such of the creditors as appeared at the hearing and the creditors have a right to question him thereon *Ram Rattan v Nathu Ram* AIR 1029 Lah 8 100 I C 557. When the Court asks him any question regarding these matters the debtor is legally bound to state the truth within the purview of sec 179 of the I P C and if he refuses to answer such questions he can be punished under the said section. The debtor is bound to answer all these questions under sec 132 of the Evidence Act though the answer may tend to incriminate him Cf *Q E v Gopal* Mad 91 *Ex parte Schofield* (18) 6 Ch D 70 *In re Jauett* (19 9) 1 Ch 108 98 L J Ch 7. Section 132 has however provided a safeguard so under that section such an answer cannot subject him to arrest or prosecution except on the ground of perjury but in an insolvency proceeding it seems that such a statement is admissible as evidence against the debtor in respect of a criminal charge *In re Joseph Lerry* 46 Cal 606 also 24 C W N 475 (A case under the corresponding provision in the Presidency Towns Insolvency Act Act III of 1909) *Re Atherton* (1912) 2 K B 251. While under examination under this sub-section a debtor should make oaths under sec 5 of the Indian Oaths Act (Act V of 18-3). When the debtor makes statements in the course of examination under this sub-section the creditors will have the right to cross-examine him thereupon.

During such examination the Court can enquire into the consideration for the debt and also the genuineness of the debts i.e whether they are tainted with fraud or collusion *Ex parte Kibble* *Re Onslow* (1875) L R 10 Ch App 373, *Ex parte Lennox* (1885) 16 Q B D 315. But see *In re Bremner* 19 Q B D 52—relied on in *Satrasala v Taliseti*, *infra*. In a recent English case a trader who manufactured certain goods by using *secret formulas* invented by him was compelled during public examination in bankruptcy to disclose those secret formulas on the ground that such formulas formed part of the *good will and assets of his business and that he was bound to communicate them to his trustees* *Re Keene* (1927) 2 Ch D 475.

The object of the Public Examination is to secure a full and complete examination and disclosure of the facts relating to the bankruptcy in the interests of the public and not merely in the interests of the creditors *In re Jauett* (1929) 1 Ch 108 98 L J Ch 7. The provision relating to the public examination of the debtor is to obtain information at as early a stage

as possible, of the property and the whole conduct of the debtor in their relations to the insolvency proceedings. They would be material at later stages of the proceedings when the debtor applies for his discharge, and then they would be most valuable to enable the creditors to oppose his discharge, *Jeer v Rangasami*, 36 Mad, 402 22 M L J 52, *Girdhari v Joynarain*, 32 All 645. See also *Satrasala v Talisetti*, (1921) M W N 109 13 L W 145 61 IC 767, *Re Atherton*, (1912) 2 KB 251, *Re Baker*, (1890) 25 Q B D 285 (295), *Narain Mistri v Ram Das*, 7 Pat 771 A I R 1928 Pat 477 111 IC 647. It should not be concluded from the provision regarding the examination of the debtor, that such examination is necessary for the determination of the matters referred to in clause (2), e.g. the conduct and dealings etc. of the debtor, or that those matters be first determined before any order of adjudication can be made, 36 Mad, 402. The examination of the debtor being necessary for an altogether different purpose, it is not to be supposed that the words 'conduct, dealings etc.', make it incumbent upon Court to consider the acts of bad faith and misconduct on the part of the debtor before the order of adjudication. The question of bad faith may be gone into at a later stage, *Uday Chand v Ram Kumar* 12 C L J 400, 15 C W N 213 7 IC 394, *Samuruddin v Kadumozhi*, 12 C L J 445 15 C W N 244 7 IC 691, *Hamud Ali v Ihtisham*, 13 OC 94 6 IC 748. So, where a petitioner feigns ignorance about the existence of his account books and prevaricates about other matters, his petition cannot be dismissed simply on these grounds, *Girwardhari v Jai Narain* 32 All, 645, s.c. 7 A L J, 835 7 IC 39.

If the debtor happens to be present in Court on the date of hearing of the case, it is incumbent upon the Court to examine him. He should be examined whether any other witnesses be or be not present, *Banarsi v Banarsi*, 9 A L J 233 14 IC 416, *Bute Mal v Gandu* A I R 1296 Lah 508 93 IC 953. The words in sub-section (2) are mandatory, therefore when the debtor is present no valid order of adjudication can be passed without an examination of him, *Dial Shah v Miran Buksh*, 23 P L R 1917 21 P W R 1917 39 IC 745. Failure to observe the procedure recommended in his sub-section will vitiate the entire proceeding *Ralla Mal v Jafar Ali*, 22 P W R 1916 33 IC 1008, Cf 3 T R 17, *Re McHenry*, (1894) 3 Ch 365, *Kearley v Thomson* (1890) 24 Q B D 742. It is only after the debtor has been examined in the presence of the creditors that the Court should consider whether sufficient cause has been shown to grant time to produce further evidence under sub sec (3), *Banarsi v Banarsi*, 9 A L J 233 14 IC 416. Cf *Bute Mal v Gandu*, (*supra*), *Prag v Ram Lal*, 37 IC 100 (Oudh), *Gillmore v Bulackilal* 19 P R 1900, *Manaparanna v Armugum*, 1 L B R 229. The provision as to the examina

tion of the debtor is mandatory but that depends on the debtor being present at the hearing of the petition *Ananta Kumar v Sadhu Charan* A I R 19 6 Cal 254 8 I C 751 That is to say if the debtor is present in Court it is obligatory upon the Court to examine him and failure to do so would vitiate the order of adjudication *Gangadas Seal v Perci al* A I R 1927 Cal 32 9 I C 92 where a debtor alleges contravention of the above rule it is for him to show that as a matter of fact he was present in Court at the time of the hearing of the petition *Ananta Kumar v Sadhu Charan supra*

Admissibility of public Examination The evidence of an insolvent in his public examination is not admissible against any body except himself It is not admissible in favour of his own estate as against a third party *Jnanendra Bala v Official Assignee* 54 Cal 751 30 C W N 346 A I R 19 6 Cal 597 93 I C 834, *Re Brunner* (1887) 19 Q B D 572 Cf 2 C W N 611 (1921) M W N 109 61 I C 67 The deposition of the insolvent in public examination under this section is not relevant evidence in an enquiry under sec 50 *Satrasala v Taliseti supra* *Re Bottomley* 84 L J K B 1020

Official Receiver has no power to examine the debtor The Official Receiver's power to examine the debtor has been taken away by Act XXXIX of 1926

Sub section (3)—Sufficient cause This will include all that will be sufficient cause within the meaning of order XVII r 1 of the Code of Civil Procedure 1908 As to the Court's duty to consider whether sufficient cause has been shown for the grant of time to the parties to produce further evidence see *Banarsi v Banarsi* 9 A L J 233 14 I C 416—followed in 93 I C 953 (Lah) Cf *Prag v Ram Lal* 3 I C 109 (Oudh)

Any evidence means both oral and documentary evidence Thus when it is necessary for the petitioning creditor to prove that the debt due from the debtor amounts to Rs 500 he may call for the debtor's account books and examine the debtor himself as a witness *In re A Y* (1902) 1 K B 98

As to summoning and attendance of witnesses provisions of O XVI C P Code may be referred to witnesses may be examined on commission when circumstances require even the insolvent can be examined on commission if necessary see *In re Anantaji Sorabji* 33 Bom 462

Sub section (4) Mode of taking evidence The mode of taking evidence under this section is different from what has been laid down in Order XVIII r 5 The procedure laid down in this section should be followed in preference to that

in the C P Code inasmuch as the Court can follow the procedure prescribed in the C P Code, only subject to the provisions of the Insolvency Act, see sec 5, *ante*. Notice that the mode of taking evidence herein recommended tallies with the provision made for unappealable cases in Order XVIII r 13. This summary record of evidence is rather an insalutary provision as it may lead to failure of justice when the case goes up before a superior Court in an appeal under sec 75.

25. [§ 15 (1)] (1) *In the case of a petition presented by a creditor, where*

Dismissal of petition the Court is not satisfied with the proof of *his* right to present the petition or of the service on the debtor of *notice of the order admitting the petition*, or of the alleged act of insolvency or is satisfied by the debtor that he is able to pay his debts or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.

(2) [New] *In the case of a petition presented by a debtor the Court shall dismiss the petition if it is not satisfied of his right to present the petition*

The Section Its Scope This is the old sec 15 (1) and corresponds to sec 7 (3) of the Bankruptcy Act, 1883. It lays down the circumstances under which the Court shall dismiss the insolvency petition. sec 24 mentions the matters required to be proved and provides for the examination of the debtor and the production of evidence, and this section shows where the insolvency petition can be dismissed. *Net Ram v Bhagirath* 40 All 75 15 A.L.J. 885 43 IC 160. The section is intended to prevent the abuse of debtors filing their application as a method of evading liability of arrest and getting out of payment of their debts. *Mathura Ram v Baldeo* Ram A.I.R. 1924 All 800 80 IC 21. It may be pointed out that there is no material difference between this Act and the Act of 1907 on the question as to what is required to be proved in order to entitle the insolvent to present his petition for insolvency. *Laxmi Bank Ltd v Ram Chandra* 46 Bom 757 24 Bom L.R. 292 1922 Bom 80 6 IC 238. Though questions regarding bad faith and misconduct may be put to him during his examination under sec 24 (2) still they are not mentioned in section 25 as grounds for dismissing the petition. So it has been held that acts of bad faith on the part of the debtor need not be investigated at the preliminary stage when the order of

adjudication has to be made, but at the final stage when an application is made for an order of discharge, *Uday Chand v Ram Kumar*, 12 CLJ 400 15 CWN 213, see also *Samiruddin v Kadumojit*, 12 CLJ 445 15 CWN 244, *Girwardlari v Jai Narain*, 32 All, 645 7 ALJ 835 7 IC 39, *Munilal v Sashibhusan*, 2 Pat LT 166 60 IC 848. Likewise, it has been maintained that in an enquiry under this section it is not pertinent to decide an issue as to whether the petitioner has made a true and full disclosure of the property, such an issue may be gone into after adjudication, *Laxmi Bank v Ram Chandra supra*. One of the insolvent's bona fides arise only when he does not before, *Racharla Narayanappa* L W 219 AIR 1926 Mad 494. The acts of the insolvent and the mala fide transfers made by him are to be enquired into by the Court, after the insolvent has been adjudged as such and not at the initial stage *Rasul Baksh v Gulab Rai*, 4 Luck 52 AIR 1929 Oudh, 371 113 IC 20. From these cases it should not be inferred that questions relating to conduct and fraudulent transfers cannot be put to the debtor during his examination under sec 24 (2). Though these matters need not be decided at the preliminary stage still information about them ought to be picked up and recorded at the earliest opportunity for use against the debtor at a later stage *Jeer v Rangasami* 36 Mad, 402 22 MLJ 52 (1911) 2 MWN 480 10 MLT 433 12 IC 618. If the applicant pleads inability to pay his debts, he should be adjudicated insolvent and if it is necessary to take steps to annul any transfer effected by him, that might be done afterwards, *Teja Singh v Balwant*, AIR 1930 Lah 16 123 IC 576.

A Judge, before he dismisses an insolvency petition under this section, should indicate one or other of the grounds, here under set forth, as that on which he purports to act, *Preonath v Nibaran* 15 CLJ 631 15 IC 870. This section is "rather a trap for Judges who do not take pains to understand it"—per Walsh A C J, in *Tara Chand v Jugal Kishore* 46 All 713 22 ALJ 684 83 IC 697. As to when the discretion under this section can be exercised, whether such discretion can be exercised in second appeal, see *Venkatarama v Buxan Sheriff*, (1926) MWN 946. It is not a valid reason for rejecting an insolvency petition that the brother of the debtor has not joined in the petition, *Net Ram v Bhagirath*, 40 All, 75 15 ALJ 885 43 IC, 160. Under sub sec (1) the Court can enquire whether there was proper consideration for judgment debt, *Re Beauchamp*, (1904) 1 KB 572. Where an ex parte order of adjudication passed on a creditor's application is vacated on the insolvent's objection under sub sec (1) of this section, the vacat-

ing order is not to be regarded as an order of annulment of adjudication, *Baliram v Supadasa*, 121 I C 55 (Nag)

Grounds for dismissing the petition.

(1) In case of petition by a creditor—

- (i) If the creditor has no right to present the petition sec 9
- (ii) If the notice of the order admitting the petition be not served on the debtor sec 19 (3)
- (iii) If the alleged act of insolvency be not proved [See sec 9 (c) and sec 6]
- (iv) If the debtor proves that he is able to pay his debts
- (v) If there is sufficient cause for not granting the petition

(2) In case of petition by a debtor—

- (i) If the debtor has no right to present the petition, [See sec 10]

Ability to pay Note that the mention of proof of the debtor's ability to pay his debts as a ground for dismissing the insolvency petition is made in clause (1), that is, the clause regarding the case of a petitioning creditor and not in clause (2) which applies to the case of a petition by the debtor, see also *Girwardhari v Jai Narain*, 32 All 645 7 ALJ 835 7 IC 39, *Ruttan v Tirath Ram*, 28 PR 1915 34 PLR 1916 29 IC 361, *Raj Kaur v Tirath Ram*, 13 PWR 1917 39 IC 590, *Mehr Singh v Dayanand College*, 44 IC 850 27 PR 1918 49 PR 1918, *Salish Chandra Addy v Firm of Rajnarain Pakhira*, 72 IC 60 (Cal), *Lakshminarayan v Subramaniam*, 45 MLJ 129 (1923) MWN 328 73 IC 74

Creditor's right to present petition See sec 9 *ante* Under sec 9 (1) (a), the debt due unto the creditor must amount to Rs 500 and under sec 24 (1)-(a) the creditor must prove this fact. For the purpose the petitioning creditor may call for the debtor's account books and examine the debtor himself as a witness, *Re X Y*, (1902) 1 KB 98. In some of the English cases, they have gone further and have maintained that not only it should be shown that the debt has reached the statutory limit, but it must also be shown that the debt is a *real* one, the Court is entitled to see that it is not put in motion without a foundation, *Ex parte Lennox*, 16 QBD 315, following *Ex parte Kebble*, LR 10 Ch 373. According to these cases the validity of the debt owing to the creditor must be established, it must be shown that it is not tainted with fraud or collusion, though in the case of a petition by the debtor, the *real* character of the debts need not be decided before the adjudication order, *Jeer*

Chetty v Rangasami 36 Mad , 402 22 M L J 52 (1911) 2 M W N 480 *Cf Manindra Nath v Rasiklal* cited at p 136, ante, and *Hukam Chand v Gangaram*, cited at p 137 ante. The petitioning creditor beside proving that he is a creditor for the requisite amount must also prove that the debtor has committed an act of insolvency, *Tara Chand v Jugal Kishore* 46 All , 713 22 A L J 684 L R 5 A 498 A I R 1924 All 686 S3 I C 967. Vide also 110 I C 737, cited at p 83. An order of the Court rejecting a petition on the ground that the petitioning creditor had not proved his right to present the petition would not operate as *res judicata* against the other creditors, *Firm of Radha Krishen v Gangabai* A I R 1928 Sind 121 110 I C 730.

Sub section (2) : When the debtor's application can be dismissed The only ground on which a debtor's application can be dismissed is that his right to present the petition has not been substantiated. See *Kalikummar v Gopikrishna*, 15 C W N 990 12 I C 48, *Jeer v Rangaswami*, 36 Mad , 402, *Daulat v Shaheblal* 6 N L R 145 8 I C 1115. A debtor is entitled to present an insolvency petition when the requirements of sec 10 have been complied with. And if he is so entitled the Court cannot dismiss his petition, and then adjudication follows as a matter of course under section 27 below see *Chhatrapal Singh v Kharag Singh*, 44 Cal , 535 25 C L J 215 21 C W N 497, 32 M L J 1, 19 Bom L R , 174 15 A L J 87 39 I C 768 (P C). Also see below. So it has been repeatedly maintained that if the requirements of this Act are complied with and the inquiries contemplated by sec 24 be completed the Court must come to a decision in respect of the various matters mentioned in this section. It cannot dismiss the petition merely because on an adjourned date the Insolvent does not appear in Court, *Lachminarain v Kishen Lal*, 40 All 665. Under the old Act inability to pay was no condition precedent to the maintainability of an insolvency application, so possession of sufficient means was no ground for its dismissal, see *Khadim Hussain v Bishan Singh*, 14 I C 224. But under the present Act, the position will be different.

This section does not say anything as to whether a Court has any inherent power to dismiss a debtor's petition when it amounts to an abuse of the processes of the Court. In some of the cases decided before the passing of this Act (Act V of 1920), it has been held that a Court has inherent power to prevent an abuse of the processes of the Court and in doing so it can dismiss a debtor's application if it amounts to such an abuse of the Court's processes, see *Ponnusami v Narasimma*, 25 M L J 545 (550), *Triloki Nath v Badri Das*, 36 All , 250 12 A L J 355 23 I C 4 (F B), *Chirunji Lal v Ajudhia Prosad* 37 I C (All), *Malchand v Gopal Chandra*, 44 Cal , 899, s c 25 C

83 21 C W N 298 Also see *Maung Po Mya Po Kyn*, 30 I C 943, *Tin Ya v Subbayya Pillay*, 18 I C 500 6 L B R 149 The petition can be dismissed also when it is not bona fide but made for an inequitable or collateral purpose *In re Pamad Mal Nemanmal*, 35 I C 541 There will be no adjudication when it is sought for a collateral or inequitable purpose *Ex parte Griffin*, 41 L J K B 107 12 Ch D 480, *Re Davies*, 3 Ch D 461 25 W R 239, *Ex parte Painter*, (1895) 1 Q B 85 A vesting order of the property of an insolvent would amount to an abuse of the processes of the Court if the order affected property to which the insolvent had only a very doubtful claim, *Gangadhar v Shridhar*, 61 I C 589 The use of Bankruptcy Law for a purpose foreign to its object is an abuse of the processes of the Court and cannot be granted, *Ponnuswamy v Narayanaswami*, 25 M L J 445 14 M L T 305 21 I C 293 Thus, an attempt at getting the estate of the insolvent managed by the Court is such an abuse, *Koppuravuru v Guntur*, (1914) M W N 153 14 M L J 587 22 I C 276 A creditor cannot be allowed to utilise the bankruptcy proceeding for the purpose of extorting, or attempting to extort money from the debtor for which the debtor is in no sense liable, 97 L J Ch 120 (1928) 1 Ch 192 "The practice of leaving a man to the mercy of his creditors who with a view of extracting money from him gets him locked up in jail after he has voluntarily placed the whole of his property at the disposal of his creditors is a practice which cannot be too strongly reprehended," *Satis Chandra Addy v Firm of Rajnarain Pakhira*, 72 I C 60 Where an earlier bankruptcy notice was still available for a petition, a second notice was given in bad faith and to embarrass the debtor, held the Court could prevent oppression by declining to act, *Re Frederick & Whitworth*, (1927) 1 Ch 253 96 L J Ch 70 (C A) Under the English law a Court may decline to make an adjudication order or may rescind a receiving order when the insolvency proceeding is an abuse of the processes of the Court Cf *Re Bond*, (1888) 21 Q B D 17, *Kaliprosanna v Harimohan*, 31 C L J 206 24 C W N 461 Similarly, a proceeding by an undischarged insolvent who goes on obtaining credits, is such an abuse, *Re Bett*, *Ex parte Official Receiver*, (1901) 2 K B 39 In the recent case of *Re Ballav Chand Serowie*, 27 C W N 739, it has been held, following *Malchand v Gopal*, *supra*, that the presentation of a second insolvency petition on the same materials is an abuse of the processes of the Court Cf *Re Victoria*, (1894) 2 Q B 387 The authority of these cases seems to have been left untouched though this sub section (2) does not contemplate the contingency suggested in those cases and though it does not make use of the general expression "sufficient cause"

Abuse of the processes
of the Court

—as is used in sub section (1)—to cover all possible cases of abuse. The debtor must have the “right” to present the petition and it cannot be said that he has the right to trifle with the Court and to present a petition which the Court cannot tolerate. For a fuller discussion on this point see the notes under the next heading. (In order to reject an insolvency petition there must be distinct finding that on the evidence before the Court the insolvent’s assets exceeded his liabilities and that the insolvent is in a position to pay up his debt) (1914) M W N 15 *supra*. A petition wilfully presented to a wrong Court should be dismissed *Ex parte May* 14 Q B D 37. Reckless borrowing bringing on bankruptcy is not necessarily such an abuse as would warrant a dismissal of the insolvency petition *Thana Velajutha v Subramania* 109 I C 636.

Dismissal on the ground of “abuse of processes of Court” It will be seen from the cases mentioned above that before the Privy Council case of *Chhatrapat Singh v Kharag Singh* 44 Cal 535 25 C L J 215 21 C W N 497 15 A L J 87 (1917) M W N 100 32 M L J 1 19 Bom L R 174 39 I C 88 (P C) the trend of the Indian decisions was to reject an application for insolvency when it constituted an abuse of the processes of the Court. The Judicial Committee however turned the tide of this judicial opinion. We may here quote the following pertinent passage from their Lordships’ judgment in the said case. “What was held was that the application was an abuse of the processes of the Court and so must be dismissed. Presumably it was on this ground too, that the High Court dismissed the appeal, no other reason is indicated. It is to be regretted that the Courts in India allowed themselves to be influenced by this plea instead of being guided to their decision by the provisions of the Act. In clear and distinct terms the Act entitles a debtor to an order of adjudication when *its conditions are satisfied*. This does not depend on the Court’s discretion but is a statutory right, and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on *so treacherous a ground* of decision as an ‘abuse of the process of the Court’. This case illustrates the *peril* of this doctrine in India for what has been treated by the Courts below as such an abuse appears to their Lordships in no way *to merit this censure*” *Chhatrapat v Kharag Singh* 44 Cal 535 (P C) 21 C W N 497, *et cetera*. The italics are ours and should be carefully noted. It should be noticed that (1) the condemnation of the doctrine about the “abuse of process is an *obiter dictum* because the case was decided on the finding that it did not “merit the censure” i.e. was no such abuse. Here we have an instance of what we call an *unhappy generalisation* of law from the Bench which should never arrogate to

itself the functions of the Legislature, (ii) Their Lordships however do not absolutely dispute the correctness of the doctrine but simply call it a "treacherous" or an unsafe, one. So we may take it that this P C case has not overruled the long series of cases cited before at p 91.

Besides, it is worthy of notice that their Lordships speak of fulfilment of "the conditions of the Act". Now, the Act requires that the petitioner should have the right to present the petition but certainly a person has no right to trifle with the Court. That is how the equitable doctrine against abuse comes in. Mere fulfilment of the conditions specified in secs 9 and 10 [old sec 6 (cls 3 and 4)] does not create this right. From those sections it is clear that non fulfilment of the conditions specified therein may disentitle a party to make the petition but the converse position may not hold good, and the statutory conditions apart from this equitable doctrine may not create the right. The Legislature has not however understood the said case exactly in the way we have done, but takes it as overruling all the Indian decisions. "It is now settled law that under the Act as it stands it is not open to the Court to reject the petition of the debtor on the ground that the application is an abuse of law" (Statement of Objects and Reasons, dated 7th September 1918). Thus, according to the Legislature the Court is powerless against the dishonest use of the machinery of the bankruptcy law, it has therefore introduced the changes in sections 24, 25 and 29 embodying the rules of limited protection, proof of financial paralysis *et cetera* and thereby proposes to accentuate the Court's potency. We cannot but admire the legislative wisdom for these new provisions but are very much disappointed at its appreciation of the Court's power or at any rate, as its spectator like attitude towards the Court's supposed want of power. If the Court is really powerless in the matter, the Legislature should have remedied the defect.

When the debtor's application cannot be dismissed

If the debts entered in the schedule are not bogus and the debtor's assets do not cover his liabilities adjudication will follow as a matter of course. *Rasul Balsh v Gulab Rai* AIR 1929 Oudh 171. A debtor's application cannot be dismissed on the ground that he has concealed some of his properties or that he has made a misstatement of his property in his petition or of the particulars of all pecuniary claims against him. *Daulat v Saheb Lal* 6 NLR 145, 8 IC 1115, *Bidlata Din v Jagannath*, 9 ALJ 699, 14 IC 570, *Behari Sahu v Juthar Mal* 38 IC 822, 1 PLW 277 or, on the ground that the petitioner had some land which he transferred to his sons but over which he still exercised rights of ownership and had not mentioned the same in the schedule of assets. *Teja*

Singh v Balwant AIR 1930 Lah 16 123 IC 576, or on the ground that the petitioner has changed his residence or mentioned fictitious debts in his application or given false account of his income or committed other acts of bad faith, *Munilal v Sasibhusan*, 2 Pat LT, 166 60 IC 848, see also *Karim Baksh v Mahabir Bania*, 19 IC 685 (Cal). Absence of available assets is no ground for refusing an order of adjudication, *Shera v Ganga Ram*, 37 IC 214 171 PWR 1916. Similarly, the failure to keep regular accounts has been considered immaterial and entailing no disqualification for the purpose of an adjudication *In re Vithaldas* 9 IC 632, *Ganesh Lal v Duarka Ram*, AIR 1927 Lah, 27 98 IC 600. A debtor's application cannot be dismissed also on the ground that he is the only son of his mother, who is possessed of large property, *Kadir Hussain v Bishen Singh*, 9 IC 633, 14 IC 224 (All). Cf p 87, nor on the ground that the petitioner's brother who was joint with him was not made a party *Net Ram v Bhagirath*, 40 All, 75 15 ALJ 885 43 IC 160. The petition for insolvency should not also be dismissed on the ground that the debtor is guilty of bad

Enquiry as to good faith not pertinent

faith or fraudulent transfer, *Samuruddin v Kadumoyi*, 12 CLJ 445, s c 15 CWN 244, read also the notes and

cases at pp 143 and 146, ante also *Uday Chand v Ram Kumar* 12 CLJ 400 15 CWN 213 *Sheikh Abdul v Basiruddin*, 17 CWN 405 15 CLJ 457, *Golam Rahman v Wahed Ali* 16 CWN 853 16 IC 470, *Jeer v Renga Sami*, 36 Mad, 402, *Giruardhari v Jai Narain*, 32 All 645 7 ALJ 835 7 IC 39, *Lakshmi Narayan v Krishnalal*, 40 All, 665 16 ALJ 703 46 IC 733, *Rattan Malik v Tirath Ram*, 29 IC 361, s c 28 PR 1915 34 PLR 1916, *Bhagirath Chaudhuri v Jamini*, 8 Pat LT 184 101 IC 445, as the question of fraudulent transfer is not relevant for the purposes of adjudication, *Rasul Baksh v Gulab Bai*, 5 OWN 776. A debtor's petition cannot be dismissed because of his endeavour to conceal a portion of his property or of his pretension that the property in his name does not belong to him, *Muhammad Hussain v Ilahi Baksh*, 10 ALJ 188 17 IC 92. The mere omission to disclose in an application for adjudication that a previous application was dismissed is not a sufficient ground for dismissing the insolvency petition, *Md Shia v Mahabir*, 15 ALJ 572, 40 IC 445. The mere fact that payments have been made to the creditor of an insolvent between the filing of the petition for insolvency and the hearing, is not a ground for dismissing the petition *Tarachand v Jugal Kishore* 46 All, 713 22 ALJ 684 AIR 1924 All 686 LR 5 A 498 Civ 83 IC 967. The mere fact that the insolvent has transferred his house to his son is no

ground for refusing him an order of adjudication, *Ram Rakha v Nazar Mal*, 52 P R 1918 127 P.L.R 1918 46 IC 435 The fact that shortly before the presentation of the petition, the insolvent transferred his property, is no ground for rejecting his petition, though it may be open to the receiver to avoid the transaction under sec 53, *Keramat Ali v Baidya Nath*, AIR 1926 Cal, 955 95 IC 297 Excess of assets over the scheduled debts or concealment of property may not be good grounds for dismissing the petition, *Baldeo Das v Sukhdeo Das*, 19 All 125, *Jualanath v Parbati*, 14 Cal, 671 In fact the extent of or any circumstance about the petitioner's property is not to be taken into consideration when dealing with an application for insolvency, *Behari Sahu v Juthier Mal* 38 IC 822, 1 P L W 227 It is no ground for dismissing an insolvency petition to say that the insolvent has been guilty of criminal misappropriation in respect of property belonging to one of his creditors *Jagannath v Ganga Dat* 41 All, 486 17 A L J 565 50 IC 192 (following *Chhatrapat v Kharag Singh*, 44 Cal, 535, P C, s c 25 C L J 215 15 A L J 87) Cf *Chirunjilal v Ayodhya*, 37 IC 391 (All) The petition should not be dismissed even if the debtor mentions some bogus debts in the schedule of liabilities appended to his petition *Munni Lal v Bhagawan Das*, 26 IC 24 (All) Cf *Khusali Ram v Bholar Mal*, 37 All, 252 13 A L J 270 28 IC 573 A petition cannot also be dismissed where the scheduled assets exceed the liabilities, 14 Cal, 671 19 All, 125 Where there are considerable debts and also certain assets which can be administered and a dividend paid to all the creditors it is contrary to the policy of the Provincial Insolvency Act to refuse adjudication, 37 IC 391 The likelihood of the insolvent's assets being consumed up in the costs of the proceedings is no ground for dismissal, *Re Jubbob*, (1897) 1 Q B 641

The mere omission to disclose that a previous application for adjudication has been dismissed is no sufficient ground for dismissing the application, *Muhammad Shua v Mahabir*, 15 A L J 572 40 IC 445 Cf *Abdul Aziz v Habid Misiri* 49 IC 229 (Cal) The fact that a debtor is a dishonest man is not itself a ground for refusing adjudication, though the fact should be fully investigated at the time of discharge *Chirunjilal v Ayodhya Prosad*, 37 IC 391 (All)

Dismissal for any other sufficient cause "Sufficient cause" is a ground for dismissing the petition applies to the case of a petitioning creditor only See *Mt Bu v Nga Po* 11 IC 743 (U B) *A dehta* sed on the ground of any v *Ram Ruffi* 4 IC 408 was some ambiguity as to whether it applied exclusively to the

case of a creditor, see 32 All, 645 7 A L J 833 7 I C 39, *In re I'thaldas*, 6 I C 632 (Sindh), *Preonath v Nibaran*, 15 C L J 631, *Trilokinath v Badridas*, 36 All 250 12 A L J 355 23 I C 4, F B But in this Act this ambiguity has been cleared up by including this expression in the paragraph meant exclusively for the petitioning creditor There are many ways in which "sufficient cause" might be shown to induce the Court to refuse to make any order (For instance, the debtor may show that some of his friends are prepared to give a guarantee for the payment of his debts in full, or that there are some proceedings pending by means of which, he may possibly obtain ample funds to enable him to pay his debts, or, there are other prospects of his being able to make such payment,) *Ex parte Dixon* (1884) 13 Q B D 118 (123) Cf *Tara Chand v Jugul Kishore*, 46 All, 713 22 A L J 684 A I R 1924 All 686 83 I C 96- A scheme of arrangement between the debtor and some of his creditors shortly before an insolvency petition which is filed by another creditor, is not a sufficient cause within the meaning of this section, *Ex parte Oram* (1885) 15 Q B D 399 If a creditor starts an insolvency proceeding from an improper motive, say, for the purpose of extortion or for the purpose of putting improper pressure on the debtor or for humiliating the debtor in the estimation of society, there will be a sufficient cause to refuse to make an order Where a proceeding is designed as an instrument of oppression and harassment or where it is an abuse of the processes of the Court or where it is frivolous or vexatious there will be sufficient cause for refusal to interfere The Court will refuse to make an adjudication if it finds that the bankruptcy petition has been made use of for an inequitable purpose, *Re Davies*, 45 L J Bk 159 3 Ch D 461 It is impossible to specifically state what will be sufficient cause, *Re Otavi*, (1895) 1 Q B 812 The Court will refuse to make a man bankrupt if the effect of such order would be to make the insolvent forfeit his life-interest, *Ibid* (What is or is not sufficient cause must depend on the circumstances of each case) *Aruna Chellan v Mg Po* 9 I C 461 It has been held that notwithstanding proof of the existence of the conditions mentioned in the statute the Court is not bound to pass an order of adjudication where the application constitutes an abuse of the processes of the Court, *Malchand v Gopal* 44 Cal, 899 25 C L J 83 21 C W N 298 Cf 27 C W N 739 *Re Hancock*, (1904) 1 K B 585 Also see the cases noted under sub-sec (2) and the commentaries at p 147 The existence of a solitary creditor is not sufficient cause to justify the dismissal of the insolvency petition *Re Hacquard*, 24 Q B D 71 There is sufficient cause within the meaning of this section where a creditor refuses to accept a tender,

which if accepted would have reduced his debt below five hundred rupees Cf *In re Lawrence* (1928) 1 Ch 665 The mere fact that the creditor has given an under valuation of his security in his petition is not sufficient cause within the meaning of the section, *Ex parte Taylor* 13 Q B D 128 When an adjudication order will be a 'vain thing' and of no use the Court should not make it, *Re Robinson* 22 Ch D 816

An abuse of the processes of Court which always is to be judged in the light of the circumstances of each case (*vide supra*) implies that the petition was presented in order to perpetrate a fraud *Maung Po Mya v Maung Po Kyn* 30 IC 943 It seems that where the fraud has already been committed and there is no new attempt to trifle with the Court there is no such abuse (*Ibid*)

Discretion, Exercise of, in appeal The above provisions of the section are discretionary Where the District Judge was not asked to exercise his discretion under this section the same ought not to be exercised in appeal *Venkaia rama v Buran Sheriff* 50 Mad 396 51 M L J 680 (1926) M W N 946 24 L W 858 A I R 1927 Mad 153 99 IC 536

Effect of dismissal The dismissal of a petition does not constitute *res judicata* see *King v Henderson* (1898) A C 720 *Oriental Bank v Richer* 9 App Cas 413 So the dismissal of a petition under this section does not bar a fresh petition whether by the creditor or the debtor specially when such a fresh petition is founded upon a fresh arrest or so forth subsequent to the dismissal of the former application *Ram Prosad v Mahadeb Lal* 2 Pat L T 335 61 IC 870 Rejection of an insolvency petition on the ground that the petitioning creditor had not proved his right to present the petition would not operate as *res judicata* against the other creditors although they had notice of the bankruptcy proceedings *Firm of Radha Kishin v Gangabal* 22 S L R 105 A I R 1928 Sind 121 110 IC 730 The dismissal will not operate as *res judicata* also as to the sufficiency or otherwise of the debt *Re Victoria* (1804) 2 Q B 387 But the principle of finality in litigation requires that when a particular petition is dismissed on a particular ground a fresh petition cannot be entertained except on a different ground

In the case of a petition by the debtor the law casts on him a duty to state the fact of such dismissal together with the reasons therefor in a subsequent petition under sec 13 (1) (f) (i) As this petition has to be verified under sec 12 no concealment in this respect is possible

No adjudication by consent or by arbitration A Court should not make an adjudication order on mere consent of the parties *In re Bullon Ex parte Loss*, (1905) 1 K B 602 (603) 19 PR 1900 FB As to whether an adjudication can be obtained by means of reference to arbitration *vide* notes at p 46 *ante*

Appeal An appeal lies to the High Court against the order of dismissal passed by the District Judge under Sec 25 acting as a Court of first instance see sec 75 (2) and Schedule I, and the order of the High Court dismissing such an appeal is also appealable to the Privy Council *Chhatrapal Singh v Kharag Singh* 40 Cal 685 sc 17 C W N 752

26 [§ 15 (2) (3)] (1) Where a petition presented by a creditor is dismissed under sub section (1) of section 25, and the Court is satisfied that the petition was frivolous or vexatious the Court may on the application of the debtor award against such creditor such amount not exceeding one thousand rupees as it deems a reasonable compensation to the debtor for the expense or injury occasioned to him by the petition and the proceedings thereon and such amount may be realised as if it were a fine

(2) An award under this section shall bar any suit for compensation in respect of such petition and the proceedings thereon

The Principle of the Section This is section 15 (2) and (3) of the repealed Act It invests the Court with a summary power to award compensation not exceeding Rs 1000/ to the *alleged* insolvent against his creditor when the insolvency petition presented by the latter is found to be frivolous or vexatious The object of this section is to provide a safe guard for a man against the machinations of his enemies who may seek to embarrass his financial position and humiliate him by setting the machinery of the insolvency law against him If the creditor's petition is dismissed under sec 25 (1), and is found to be frivolous or vexatious the Court may award the compensation which should on no account exceed Rs 1000 This sum is supposed to cover the expenses incurred and the damages suffered by the insolvent by reason of the frivolous or vexatious proceeding As to the maintainability of a suit for damages for bankruptcy proceedings without reasonable and probable cause even without proving special damages

see *Wilson v United Counties Bank Ltd*, (1920) A C 102 (120), *King v Henderson*, (1898) A C 720, also see (1883) 11 Q B D 674, *infra*, (1905) A C 168

A B Compare this section with sec 93 of C P Code. The application of the section may be barred by Local Government under sec 81 read with Sch II

When the Compensation is to be awarded To apply this section two conditions must be fulfilled (i) Dismissal of the creditor's petition must be under sec 25 (1), (ii) The petition must be shown to be *frivolous* or *vexatious*. Cf *Metropolitan Bank v Pooley*, 10 App Cas 270. The provision of this section is *penal* in nature and therefore according to the accepted rule of interpretation should *strictly* be construed. Cf *Makhan Lall v Babu Srikissen*, 12 M I A 157 11 U R P C 19. *Amanant v Bhajan*, 8 All, 438 (445). So this section cannot apply unless the dismissal is under sec 25 (1). It is doubtful if dismissal for default is within the scope of that section. So it seems that no compensation can be awarded under this section when the creditor's petition is dismissed for default. The other condition for the application of the section is that the Court must be satisfied that the petition was *frivolous* or *vexatious*. The word "*frivolous*" refers to the trivial nature of the thing. The petition is *vexatious*, when it is intended to harass the insolvent or to cause annoyance to him. Cf *Benimadhav v Kumadkumar* 30 Cal 123 (F B), s c 6 C W A 799. A frivolous petition may or may not be a false one. The term '*vexatious*' implies that the petition should not have been at all made. A false petition must necessarily be a vexatious one (*Ibid*). Note that the two words are linked by the word 'or' so that either of them may serve the purposes of this section. This section should be compared with Sec 250 of the Cr P C 1898 the provisions whereof are somewhat similar to those of the present section and the cases under that section may be referred to in this connection.

May This word shows that the order for compensation is in the discretion of the Court. The Court should not act *suo motu* under the section, it can act only *on the application of the debtor*. The Court has again to use its discretion in fixing the amount but such amount should on no account exceed Rs 1000.

Realisation of Compensation The amount of compensation may be realised as a fine so it may be levied (a) by attachment and sale of moveable property, (b) by execution according to civil process (see sec 386, Cr P C). Cf *Ram Jivan v Durgacharan* 21 Cal 979 (985). Such a sale may take place even after the death of the person fined. Cf *Q E v Sitanath*, 20 Cal 4-8.

Sub-section (2) An award under this section bars a suit for damages in respect of a dismissed insolvency petition and the proceedings thereon. Cf *Bachulal v Jagdani* 26 Cal, 181. Compare with this sub-section Sec 250 (5) of the Cr P C 1868 under which such a suit for damages is not barred, but the amount of compensation is taken into account in assessing the damages. Cf *Hjalt v Palmer* (1899) 2 Q B 105, *Quarby Hill Gold Mining Co v Eyre* (1883) 11 Q B D 674.

Appeal An appeal against an order under this section lies to the High Court see Sec 5 () and Schedule I.

Order of Adjudication

27 [§ 16. (1)] (1) *If the Court does not dismiss the petition it shall make an order of adjudication and shall specify in such order the period within which the debtor shall apply for his discharge*

[New] (2) *The Court may if sufficient cause is shown extend the period within which the debtor shall apply for his discharge and in that case shall publish notice of the order in such manner as it thinks fit*

Change of Law This is sec 16 (1) of the Act of 1907 with slight verbal alterations and with the omission of the words "and the debtor is unable to propose any composition or scheme which shall be accepted by the creditors and approved by the Court in the manner hereinafter provided" and with the introduction of a very important provision fixing a time limit for discharge. The last two lines of sub-section (1) contain the provision regarding this time limit and the new sub-section (2) empowers the Court to extend this time limit under proper circumstances.

The effect of the omission of the aforesaid words within quotation viz "and the debtor provided from the old section 16 (1) has made a difference between the old section and this new one. Under the old section there was an obstacle for immediate adjudication viz the proposal of a scheme by the debtor to the Court for the acceptance of the creditors but now this obstacle has been removed. The reason for the change has been explained in the Notes on Clauses *vide supra*. Under the English law a composition can be made (i) after the receiving order and prior to adjudication or (ii) after adjudication. But under the Indian Law there is no formal receiving

order procedure at all, and the order of adjudication is made on the hearing of the petition. As before adjudication and the proving of the creditor's debts a scheme cannot possibly be accepted, (see *Fleming Shaw v Sadiram*, 9 SLR 181 32 IC 365, and the notes under section 38), the words relating to composition and scheme have been omitted as aforesaid, so the above obstacle now no longer exists. Now, the Court will not consider any scheme for composition before adjudication. Cf *Re Assomal*, 4 SLR 222 9 IC 724, *Luchminarain v Kripan Lal* 10 ALJ 703 47 IC 733, *Ramrakha v Narai Mal*, 52 PR 1918 46 IC 435.

Sub-Section (1) : This section provides that if the Court does not dismiss the petition under sec 25, it shall make an order of adjudication, so it follows that when the requirements of sections 9 and 10 are complied with, and a petition is made in accordance with sec 13, the Court will see whether or not it is to be dismissed under sec 25. If it is not so dismissed an adjudication order will follow as a matter of course, for, the word 'shall' in the above circumstances, makes it obligatory on the Court to make an order of adjudication, *Udaychand v Ramkumar*, 12 CLJ 400, 15 CWN 213, *Samiruddin v Kadumoyi* 12 CLJ 445 15 CWN 244, *Hanted Ali v Ihtishan Ali* 10 OC 94 6 IC 748, *Naga Naing v Mi Bu* UBR (1911) 186 11 IC 745. "In clear and distinct terms the Act entitles a debtor to an order of adjudication when its conditions are satisfied. This does not depend on the Court's discretion but is a statutory right and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground as an abuse of the processes of the Court." *Chhatrapat Singh v Kharag Singh* 44 Cal, 535 (540) 25 CLJ 215 21 CWN 497 (PC) and the cases cited at pp 145 46. See also *Triloki Nath v Badri Das* 36 All 250 12 ALJ 355 23 IC 4 (FB). A Court has no jurisdiction to annex any condition to the adjudication order. *Ram Chandra v Shyama Charan* 19 CLJ 84, sc 18 CWN 1052. At the time of making an order of adjudication, the Court should not consider the course of administration of the insolvent's estate to be adopted afterwards. *Debendra v Purusottam* 55 IC 186 (Cal). So where an order of adjudication provided that as a condition of his being adjudicated insolvent the party should pay into Court Rs 6 monthly out of his salary and to place at the disposal of the Court his share in ancestral property the Court held (1) that the direction as to monthly payment out of salary was illegal because of sec 60 (1) of the C P Code, (2) that the direction relating to the ancestral property was superfluous because the adjudication order automatically vested the same in the receiver, *Jahar Ali v Musharalan*, 9 Pat 304. The Court cannot order cancellation of a

or the very order of adjudication and for
 edure prescribed by sec 53 has to be
Chinna 45 Mad 189 41 M L J 606
 14 L W 630 66 I C 771 Where a
 ion for adjudication as an insolvent the
 without making an order for adjudication
 er to order a debtor of the insolvent to
 nonev which he owes to the insolvent
 I C 537 (Nag)

der made without jurisdiction is a nullity
 al 21 Bom 205 Though an adjudica
 aside on appeal still so long as it stands
 disputed by anybody except on proof
 y fraud Cf sec 44 of the Indian Evi
Ell v Blake (183) 8 C P 533 22 W R
 79) 12 Ch D 905

made a new provision namely that at
 the time of making an adjudication
 order the Court shall also specify a *period*
within which the debtor must apply for
his discharge This provision is impera
 tive *Gopal Ram v Magni Ram* 7 Pat
 338 107 I C 830 (F B) and the reasons
 ve been thus explained in the Statement of
 — One of the principal defects in the
 m the fact that the conduct of the debtor
 comes under the scrutiny of the Court
 he misconduct of the debtor should come
 at which most of the provisions affecting
 would operate is when he applies for his
 is nothing in the Act which requires him
 harge and in practice such applications
 this unsatisfactory state of law it is pro
 he Act provisions which will compel an
 the Court within a prescribed period for
 e the protection afforded by the insolvency
 period shall be specified in the order of
 In a Lahore case it was specified in an
 t of the order and it was held that the
 art of the adjudication order and dis
 ould not entail annulment of adjudication
Das 7 Lah L J 553 6 Punj L R
 sh 24 92 I C 235 This seems to be
 in the time limit fixed by the Court the
 tion to apply for discharge when he likes
Mohammad Ali cited under the heading
 der sec 41

ency petition is transferred to the Official

Receiver for adjudication, he has the power to fix the period for applying for discharge, *Arunagiri v Kandaswami*, 19 L W 418 (1924) M W N 331 A I R 1924 Mad 635 83 I C 955

Adjudication takes effect forthwith An adjudication order takes effect the moment it is made and is not dependent upon notification in the Gazette, nor upon appointment of Receiver, Cf *Re Manning*, (1885) 30 Ch D 480 It takes effect even before it is signed or formally drawn up, *Ibid*, also *Blunt v Whitely*, (1898) 6 Mans 48, Halsbury's *Laws of England*, Vol II, p 60 It takes effect from the date on which it is made by the Lower Court even where it is subsequently confirmed on appeal, *Re Raatz*, (1897) 4 Manson, 50, *Re Teale, Ex parte Blackburn*, (1912) 2 K B 367.

No Second Adjudication order It is not open to an insolvent to apply for a second order of adjudication until he has obtained an order of discharge or until his previous adjudication has been annulled, *Ram Dass v Sultan Husain*, A I R 1929 Oudh, 149 115 I C 107

Sub section (2) This sub-section gives the Court a discretionary power to extend the period, originally fixed, for the purpose of the discharge, if there is sufficient cause for so doing Such enlargement of time is permissible even when the period originally fixed has expired, (if an order of annulment has not already been made under sec 43), *Abraham v Sookias* 51 Cal, 337 A I R 1924 Cal, 777 81 I C 584, *Saligram v Official Receiver*, A I R 1926 Sind, 94 91 I C 467, *Kunnanmul Nathmul v Anoop Sahu*, 108 I C 803, *K K S Chettiar v Maung Myat Tha* *infra* See also *Arunagiri Mudaliar v Kandaswami Mudaliar*, 19 L W 418 (1924) M W N 331 1924 Mad, 635 [in which the two learned judges Krishnan and Waller, JJ have taken conflicting views, Waller J's view has found favour in 49 M 935 (1926) M W N 674], *Palani Goundan v Official Receiver, Coimbatore*, 53 M 288 31 L W 365 58 M L J 369 A I R 1930 Mad 389 F B The principle enunciated in sec 148, C P Code is not repugnant to the provisions of this section Therefore the fact that the application for extension is made after the expiry of the fixed date will not be a fatal defect, *Lakhi v Molar* 26 Punj L R 126 A I R 1925 Lah, 416 86 I C 115—followed in *Iateh Muhammad v Maya Das*, A I R 1927 Lah 763 100 I C 134, *Kallu Kutti Parambath v Puthen Peetikakkal* 22 I W 542 49 M L J 595 91 I C 144 See also *Jethaji Peraji Firm v Krishnappa* *infra* *Abbireddi v Venkatareddi*, A I R 1927 Mad, 175, *Manikkam Pattar v Manchappa*, (1928) M W N 441, *vide* notes under sec 43

The order of adjudication does not *ipso facto* become annulled by the expiry of the time fixed and extension of

time is possible so long as the adjudication is not annulled, ✓
Gopal Ram v Magni Ram - Pat 375 AIR 1928 Pat 338
 10 IC 830 FB, *Ganpat v Hangir*, AIR 1929 Nag 11
 113 IC 357 See also 53 Mad 288 (FB), (*supra*)

The section does not say who is to move for enlargement of time under this section. That the debtor can apply goes without saying. There is nothing in the section to prevent a petitioning creditor from applying for such an extension, and as such extension may at times be for his benefit, he may show good cause for deferring the grant of discharge. *K K S Chettiar v Maung Mya Tha* 6 Bur LJ 5 AIR 1927 Rang 136 100 IC 921, *Jethaji Peraji Firm v Krishnappa* 5 MLJ 116 (1929) MW 489, *Suppiah Mooppanar v Mallappa Chetty* (1929) MW 809. The Court can grant extension of time even *suo motu*. *Rup Singh v Official Receiver* 10 Lah 357 10 Lah LJ 156 AIR 1928 Lah 82 107 IC 394. A prayer for extension of time can be implied from circumstances and an application for discharge can be regarded as an application for extension of time although it does not specifically ask for such extension. *Sohna Ram v Tara Chand* AIR 1929 Lah 399 117 IC 87.

Application for extension by implication

Appeal An appeal lies to the High Court under sec 75 (2) and Schedule I against an order of adjudication under this section. Cf *Kallukutti Parambath v Kuttiah* 49 MLJ 595 AIR 1926 Mad 123. But no appeal lies from an order rejecting an application for extension under sub section (2) of this section. *Re Ganga Prasad* AIR 1926 Oudh 186 89 IC 959. An order granting an extension of time hereunder is not a decision under sec 4 and consequently a second appeal does not lie from such an order. *Sambamurthi v Ramakrishna* 52 Mad 337 55 MLJ 837 29 LW 60 AIR 1929 Mad 43 114 IC 847.

28. (1) On the making of an order of adjudication the insolvent shall aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors

(2) [§ 16 (2), (3) (4)] On the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a

receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt or commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose

(3) For the purposes of sub section (2), all goods being at the date of the presentation of the petition on which the order is made, in the possession or disposition of the insolvent in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof shall be deemed to be the property of the insolvent

(4) All property *which* is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receiver, and *the provisions of sub section (2) shall apply in respect thereof*

(5) [**§ 16 (2) (a)**] *The property of the insolvent for the purposes of this section shall not include any property (not being books of account) which is exempted by the Code of Civil Procedure 1908 or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree*

(6) [**§ 16 (5) (6)**] Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed

(7) An order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made

N B—Sub-section (1) is *new*, the other sub-sections correspond to sub-sections (2), (3), (4), (5) and (6) of sec 16 of the Act of 1907. The introduction of sub sec (1) is thus explained in the *Notes on Clauses* "Apparently the duties imposed on the debtor by sub sec (1) of section 43 arise as soon as the Court has made an order under section 12 (1). It seems desirable to make this clear. It is difficult to see how the debtor can be under any obligation to assist in the distribution of his property, unless he is adjudged an insolvent. It is proposed, therefore, to amend the concluding part of sub-section (1) and to relegate to a separate sub section the provisions which impose on the debtor the duty of aiding in the distribution of his property." It should be noticed that the old sec 16 (2) of the Act of 1907 barred a creditor's remedy both against the property and *person* of the insolvent, but the word "person" has been omitted from the present sec 28 (2). The effect of this omission may justify a contention that a creditor can apply for execution of his decree by arresting the insolvent without first obtaining the leave of the Insolvency Court to do so *vide* notes under the heading "Arrest," at p 183, *infra*.

Object of the Section This section has been enacted for the purpose of enabling the Court to keep a proper control over the administration of the estate in the insolvency proceedings, *Louis Dreyfus & Co v Jan Mahomed* 12 S L R, 61 49 I C 421 426 *Jitanyi Mamooji v Ghulam Hussain* 12 S L R 20 47 I C 771. The Insolvency Court possesses an exclusive jurisdiction to deal with the insolvent's estate and this section read with section 56 authorises the Insolvency Court to direct the delivery of the insolvent estate to the Receiver, *Kochi Mahomed v Sankaralinga* 44 Mad, 524 14 L W 505 40 M L J 219 (1921) M W N 236 62 I C 495.

Sub-sec. (1) —Post-adjudication Duties of the Insolvent This sub-section lays down the *post* adjudication duties of the insolvent, just as sec 22 lays down the duties of the debtor upon the *admission* of the insolvency petition. Obligation to aid in the realisation and distribution of the property can possibly arise only after *adjudication*. See notes under sec 22 under the heading "Change of law," at pp 126 127, *ante*. Compare the provisions of this sub-section with those of sec 22 (3) of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926. It is the duty of the insolvent to attend the Court and to give his evidence whenever required by the Receiver and the Receiver can ask him to do so without issuing any sub-poena. Cf *In re Fitzland*, 1916 H B R 157. This sub-section, however, cannot impose on the debtor a duty unconnected with the realisation of his assets. Thus, the receiver cannot compel him to submit

to an examination with a view to effecting an insurance on his life, *Board of Trade v. Block*, 13 App Cas 570 Cf sec 59A As to the penalty for failure to perform the duties hereunder, vide 25 I C 363 and 49 I C 55, cited under sec 69, *infra*

Receiver's position "A Receiver under this Act is exactly in the same position as the trustee in bankruptcy The whole property of the insolvent is vested in him as he is the owner of the property until he is discharged," *Amrita Lal v. Narain Chandra*, 30 C L J 515 53 I C 973 The Receiver takes the insolvent's property subject to all the burdens and obligations (e.g., a claim of pre-emption) to which it was subject in the insolvent's hands, *Sheonarain Singh v. Kulsum unnessa*, 52 M L J 658 (P C) Vide also the cases and notes under sec 56, under the caption "Receiver, Appointment and Removal"

Receiver need not sue for possession When the property of the Insolvent, upon adjudication, vests in the Receiver, it is open to the latter to ask for a declaration without suing for possession of the property, inasmuch as the declaration would enable him to sell or mortgage the property for the benefit of the creditors, *Mahomed Fatima v. Mashuq Ali*, 44 All, 617 20 A L J 569 L R 3A 406 A I R 1922 All, 448 68 I C 245 Vide also the notes

No limitation for obtaining possession under sec 56 (3) There is no limitation for a Receiver obtaining possession of insolvent's property which vests in him at any time between the date of making the order of adjudication and the date of its being annulled *Balakrishna Menon v. Veeraraghavan* 45 Mad, 70 41 M L J 334 (1921) M W N 775 14 L W 334 A I R 1922 Mad, 189 69 I C 326

Sub-sec. (2). Vest This sub section lays down the legal consequence that follows the order of adjudication Cf sec 7 (1) of the Bankruptcy Act, 1914 as amended by the English Bankruptcy (Amendment) Act, 1926 As soon as the adjudication order is made, the whole of the property of the insolvent shall vest in the Court, or, where a Receiver is appointed, in the Receiver, and shall become divisible among his creditors, *Mahomed Fatima v. Mashuq Ali*, 44 All, 617 20 A L J 569 A I R 1922 All, 448 68 I C 245, *Jachmandas v. Jai Singh*, 4 Lah L J 262 A I R 1922 Lah 399 79 I C 548, and thereafter during the pendency of the insolvency proceedings no creditor of the insolvent shall have any remedy against his property Any subsequent attachment of the property of the insolvent is, for all legal intents and purposes, a nullity and does not confer any advantage, *Jetha Dhima v.*

Lady Janbu 14 Bom L.R. 511 15 I.C. 950 The main object of an adjudication order is to place the estate under the custody and control of the Court, through its officer, the Receiver, *Louis Dreyfus v Jan Mahomed* 12 S.L.R. 61 49 I.C. 421. The words "as hereinafter provided" in this clause qualify the word "Receiver" and not the word "vest," *Official Receiver, Coimbatore v Kanga* 45 Mad., 167 14 L.W. 656 (1921) M.W.N. 858 42 M.L.J. 53 69 I.C. 908. The vesting of property takes place upon adjudication, *Subramania Iyer v Official Receiver Tanjore*, 23 L.W. 300 50 M.L.J. 665 93 I.C. 877, and the insolvent's property in any part of British India vests in the Receiver, without any formal conveyance or assignment, Cf *Ex parte Rogers, Re Boustead*, (1881) 16 Ch.D. 665, *Official Assignee v Chandulal*, 76 I.C. 657 (Sind). According to some opinion, the insolvent's property vests in the Receiver, though situated in a

If foreign property vests in Receiver foreign territory, *Draupadi Bai v Govind Singh*, 65 I.C. 334 (Nag), that is, it vests irrespective of the question

whether the Receiver will be able to get possession of the property if it is in fact situated outside British India, *Lang v Jaswantlal*, 50 Bom., 439. But in a Calcutta case it has been held that this Act cannot operate in a territory where the Indian Legislature could not give the law. *Vide* notes at p. 5, ante. Therefore the provision as to vesting contained herein cannot be expected to operate as regards the insolvent's immovable properties in a foreign country. As to whether immovable property in British India vests in the trustee in Bankruptcy on an adjudication in a foreign territory, see *Rangaswami Padaychi v Narainswamy*, 34 Mad., 247 (1910) M.W.N. 695 7 I.C. 417. *Vide* also the notes and cases under the heading "vest" under sec. 56, post. The use of the word 'whole' shows that even the properties outside the jurisdiction of the Court vest in the Receiver, *Re Naoroji*, 33 Bom., 462, *Re Ganeshdas* 32 Bom. 898 10 Bom. L.R. 77, *Lang v Jaswantlal* 50 Bom., 439, *Draupadi Bai v Govind Singh* 65 I.C. 334 (Nag), *supra*. The property of the insolvent vests in the Receiver subject to the equities to which they are subject in the hands of the insolvent, *Sheonaram Singh v Kulsum un nissa* 52 M.L.J. 658 (P.C.), *supra*. So where a person is adjudicated insolvent after entering into a contract for sale, the Receiver will be bound to execute a deed in pursuance of the said contract and he will be a necessary party in the suit for specific performance, *Purushottam v Ponnurangam*, (1913) M.W.N. 897 75 M.L.J. 92 21 I.C. 576. Where a firm is adjudicated insolvent, each partner of that firm becomes an insolvent. Consequently, no suit can be brought against any of the partners without the leave of the

Court, *Honda Ram v Chiman Lal*, A I R 1927 Lah 234 100 IC 112

The effect of adjudication is to place the administration of the insolvent estate including the realisation of assets under the control of the Court, for the benefit

Effect of adjudication of all the creditors and for the purpose and vesting of making an equitable distribution to them, *Vasudeva v Lakshminarayan*, 42

Mad 684 36 M L J 453 52 IC 442 The order of adjudication operates to vest the insolvent's property in the Court or the Receiver and no creditor has thereafter any remedy against the insolvent's estate whether by suit or otherwise, *Trimbak v Shicoram* A I R 1924 Nag 108 65 IC 941 Cf *Seth Sheolal v Girdharilal* A I R 1924 Nag , 361 , nor is the insolvent himself entitled thereafter to deal with the property as its owner , all his dealings therewith will be inoperative and he cannot any more pass a valid title to his alienee Therefore, where the assignee from a co sharer sued for the recovery of his share of the profits from the Lambarder under the Agra Tenancy Act, it would be a valid defence to say that the plaintiff had no valid title to sue by reason of his assignor's insolvency, *Gorind Ram v Kunj Behari*, 46 All , 398 27 A L J 217 L R 5 All 65 (Rev) A I R 1924 All , 341 The effect of vesting of the property in the Receiver is that any charge, created whether by decrees or otherwise, after the date of the insolvency petition is not binding against the receiver, *Tulsi Ram v Mahomed Araf*, A I R 1928 Lah 738 109 IC 373 After bankruptcy, the debtor's interest in the property ceases , so the debtor is no longer a necessary party in a suit relating to the property, Cf *Prince Victor v Kumar Bhairabendra* 34 C W N 53 As soon as the order of adjudication is made the insolvent's property vests in the Court or the Receiver (as the case may be) by operation of law, *Sannyasi Charan v Krishnadhan*, 49 Cal , 560 26 C W N 954 35 C L J 498 20 A L J 409 43 M L J 41 A I R 1922 P C 237 67 IC 124 (P C), and therefore no formal "vesting order" is necessary , *Official Receiver, Trichinopoly v Soma sundaram Chettiar*, 30 M L J 415 34 IC 602 , *Ramaswami v Muthusamia*, 41 Mad , 923 33 M L J 581 (1918) M W N 766 48 IC 756 And thereafter any dealing with such property without notice to the Receiver is *ultra vires*, *Kochi Mahomed v Sankaralinga*, 44 Mad , 524 40 M L J 219 14 L W 505 (1921) M W N 236 62 IC 495 , *Mokshagunam Subramania v Rama Krishna*, 42 M L J. 426 16 L W 41 A I R 1922 Mad 335 70 IC 357 , at any rate, it will be inoperative as against the Receiver, *Sripat Singh v Hariram Goenka*, 26 C W N 739 16 L W 447 A I R 1922 P C 51 74 IC 597 (P C) , *Sannyasi Charan v Krishnadhan*, (supra)

After adjudication the insolvent is not competent to make any reference to arbitration *Tulsi Ram v Mahomed Arif supra*. After the property has vested in the Receiver the insolvent has no saleable interest in the property *Ram Soondur v Slosht* 11 C L R 59. So where a debtor is adjudged an insolvent and his property vests in the Receiver, and the property is sold in execution of a simple money decree against him the purchaser acquires no interest in the property sold *Sundarappaiyar v Arunachella* 31 Mad 493 18 M L J 48. Therefore it has been held that where during the pendency of insolvency proceedings a property of the insolvent was sold in execution of a decree without bringing the Official Receiver on the record the sale is void and not binding on the Official Receiver *Nai ar Rowther v Kuppal Pichai* (1929) M W N 168 A I R 1929

Mad 609. After the presentation of an insolvency petition the insolvent cannot validly pay his debt to any of his creditor and such payment has no effect as against the Receiver *Janaki Rai v*

Payment to creditor behind the back of the Receiver

Official Receiver 8 I C 16 *Onkara v Bridgland* 73 I C 103. After the vesting of the property in the Receiver he is the only person who can discharge the debts of the insolvent. Any payment made by the insolvent or anybody on his behalf to his creditors behind the back of the Receiver is highly irregular and the money so paid must be returned to him before any composition with the creditors can be sanctioned by the Court *Re Subramaniam Chetty* (1926) M W N 784 24 L W 658 A I R 1926 Mad 1166. A landlord by reason of his insolvency does not however become incompetent to issue a notice of ejectment to his tenants *Rangai v Deokinandan Pandey* L R 5 O 7. The principle of this sub-section should be invariably observed and the Receiver should have the carriage of the insolvency proceedings not merely in the lower Court but also on appeal *Narasimham v Hanumanth Rao* (1922) M W N 717 A I R 1922 Mad 439 70 I C 572. When by virtue of this sub-section the property vests in the Receiver the insolvent is *ipso facto* divested of the same and has therefore no vested interest until it is restored after administration *Subbaraya v Papathi Ammal* (1918) M W N 289 7 L W 516 45 I C 239. Therefore after the vesting order the insolvent cannot maintain a suit or an appeal in respect of his property *Ibid*. Therefore after an adjudication order a judgment debtor will have no right to appeal from an order in execution proceedings confirming a sale of his properties. The proper person to appeal in such a case is the Official Receiver *Bhagwan Das v Amritsar National Bank* A I R 1928 Lah 675 111 I C 432. But it has been held in a Bombay case that the adjudication of a person during the pendency of a civil suit

does not disqualify the insolvent from appealing against the decree in that suit, *Ramchandra v Shripati*, 31 Bom L R 357 A I R 1929 Bom 202 118 I C 252 After adjudication, a defendant has no right to remain as such on the record of the case but the trustee in bankruptcy ought to be substituted in his stead under O XXII, r 10 of the C P Code see *Prince Victor v Kumar Bhatrabendra*, 34 C W N 51 In some of the Madras cases it has been held that where an adjudication of insolvency is made by an Official Receiver in the exercise of the powers delegated to him under sec 80 the insolvent's estate does not vest in the Official Receiver under section 56 or any other provision in the absence of an express vesting order, *Muthusami Saamiam v Samoo Kandiar* 43 Mad 869 39 M L J 438 12 L W 262 (1920) M W N 537 59 I C 507, following 30 M L J 415 (*supra*), *Subba Aiyar v Ramasami*, 44 Mad, 547 (1921) M W N 135 40 M L J 209 62 I C 146 and in the absence of such a vesting order the property vests in the Court and not in the Receiver *Narasimudu v Basara Sankaram*, 47 M L J 749 20 L W 946 A I R 1925 Mad 249 84 I C 439 It will not be worth our while to scan the soundness of this view as sec 80 (1) (a) now stands repealed by Act XXXIX of 1926 *Vide* also the notes under the heading "Vest" under sec 56, *post*

The Receiver is entitled to realise the insolvent's dues from his debtors *Kanhaya Lal Mohan Mal v Radha Kishen* 112 P L R 1913 92 P W R 1913 18 I C 206 But he may be precluded by his own conduct from so doing if he sanctioned payment by the debtors to the insolvent himself, *Re Wilson Ex parte Salaman*, (1926) 1 Ch 21 An insolvent's solvent debtor cannot be absolved from his liability to pay interest on the ground that the insolvent has filed his petition in insolvency, *Kanhaya Lal Mohan Mal's case supra* The provisions of this section as to the vesting in the Receiver of the insolvent's property are controlled by those of sec 55, and by virtue of the provisions of that section a debt vested in the Receiver may be discharged by a *bona fide* payment, without notice, made to the insolvent between the dates of application for insolvency and adjudication *Onkarsa v Bridi Chand*, 6 N L R 213 19 N L R 144 A I R 1923 Nag 290 73 I C 1037 The bankruptcy of a party does not necessarily result in such an incapacity to perform a contract as to entitle the other party to the contract at once to treat it as broken and to claim damages *Brooke v Hewitt* (1796) 3 Ves Jr 253 It may be for the benefit of the bankrupt or insolvent or of his estate to complete the contract and the representatives of his estate may be authorised to do so *Ex parte Stapleton* (1879) 10 Ch D 586, see also *Currimbhoy & Co v Creet* 50 C L J 208 Where a property is attached before judgment and afterwards vests in the Receiver

on the debtor's bankruptcy, the Receiver can put forward his claim for priority under section 51 and the Court can deal therewith under section 151, C P C and the Receiver's application for claim will not fall within the Scope of O XXI, r 58, of C P Code and will not therefore attract the operation either of O XXI, r 63, C P C or Art 11 of the Limitation Act, *Balakrishna Menon v Icceraghata* 45 Mad 70 41 M L J 334 (1921) M W N 775 69 IC 326

Sec 40 of the C P Tenancy Act causes a proprietor who temporarily loses his right to enjoy his proprietary rights in the *sir* land to become an occupancy tenant of such *sir* land. When such a proprietor is adjudicated an insolvent his proprietary rights in the *sir* land vest in the Receiver and he loses temporarily his right to proprietary enjoyment. The order of adjudication therefore causes the proprietor of a village to become an occupancy tenant of the *sir* land, *Vagoba v Zinjarde*, 26 N L R 46 A I R 1929 Nag 338 121 IC 54 See also at p 174, *infra*

No Divesting by insolvent's death The effect of the death of the insolvent is not to *divest* the Receiver of the property which has already vested in him by reason of the adjudication, *Lachmandas v Jai Singh*, 4 L L J 262 A I R 1922 Lah 399 79 IC 548, *Re Ibrahim Lalji* 9 IC 633 (Sind), also see the cases cited under sec 17 at pp 112-13, *ante*

Adjudication and vesting order is a judgment in rem : An order adjudicating a person as an insolvent and vesting his property in the Official Receiver operates as a judgment *in rem* [Taylor on Evidence, para, 1743] but the ground on which the order is based has no such effect. See *Firm of Radha Kishen v Gangabai*, A I R 1928 Sind 121 110 IC 730 Cf *Ballantyne v Mackinnon*, (1896) 65 L J Q B 616 (621). A negative order refusing to adjudicate an alleged member of a firm as an insolvent on the ground that such person was not a partner in the firm cannot operate *in rem*.

Property The whole of the debtor's property vests as above, but the word "property" in this section does not include any property (not being books of account) which is not attachable under C P Code or under any other Act see sub sec (5) below. The property which is divisible among the bankrupt's creditors is property which belongs to or is vested in the insolvent at the commencement of the bankruptcy or which is acquired by or devolves on him before his discharge. *Radhul Kuer v Sushil Chandra*, 11 Pat L T 138. Property here includes all *real* and *personal* estate and effects of the insolvent and all his future estate, right title and interest. *Fakir*

1. Real and personal estate

Chand v Moli Chand, 7 Bom, 438, so all the properties which the insolvent may acquire or which may devolve upon him after the order of adjudication and before his discharge forthwith vest in the Receiver, *Mahomed Fatima v Mashuq Ali* 44 All 617 20 A L J 569 L R 3 A 406 A I R 1922 All 448 68 I C 245 The property which has long passed out of the hands of an insolvent by a valid gift, has ceased to be his property and cannot vest in the receiver, *Radhika Kuer v Sushil Ch supra* The right to receive a debt is property within the meaning of sec 2 (d), and vests in the Receiver under this section, *Onkarsa v Bridichand*, 19 N L R 144 6 N L J 213 A I R 1923 Nag 290 73 I C 1037 Therefore the Receiver is entitled to realise the insolvent's dues from his debtors *Kanhayalal's case, supra* Money realised in execution of a decree held by the insolvent which was attached

2 Money realised in by a creditor is part of the insolvent's execution by debtor estate, *Firm of Adamji v Firm of*

3 Equity of redemp *Basrid* A I R 1926 Sind 77 89 I C tion 330 Equity of redemption is property

and vests in the Receiver upon the mortgagor's insolvency, *Purushottam Naidu v Ramaswami*, 20 L W 667 A I R 1925 Mad 245, *Mokshagunam Subramania v Rama Krishna Aiyar*, 42 M L J 426 16 L W 48 A I R 1922 Mad 335 70 I C 357, *Gobinda v Abdul Kadir* A I R 1923 Nag 150 Vide also under sub sec (6) *infra* The share of an insolvent in a partnership business is property and vests in the Receiver on insolvency *Kappu Ramanadha v Nogindra Aiyar*, 45 M L J

827 18 L W 868 A I R 1924 Mad 223 Cf *Vishendas v Thawerdas*, A I R 1925 Sind, 18 80 I C 642, in

4 Partnership assets are property which it has been held that all property and not merely property liable to attachment and sale vests in the Receiver Cf 79 I C 384 Consequently, although partnership property cannot be attached and sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such except in the manner prescribed by O XXI, r 49 of C P Code, that will not prevent the vesting of a partner's interest in the partnership assets on his bankruptcy Some confusion in this direction has resulted from the cardinal principles of partnership law that in the absence of any contract to the contrary (i) no person can introduce a new partner in the firm without the consent of all the partners sec 253 (6), the Indian Contract Act, and (ii) if from any cause any member of a partnership ceases to be so, the partnership is dissolved as between all the other members, sec 253 (7), *ibid* This inability to introduce a new partner coupled with the restriction on attachment and sale of partnership property introduced by O XXI, r 49, and certain observations in *Syud*

Tuffuzool Hossein v Rughoonath Pershad, 14 M I A 40, *Dwarika Mohun v Lukhimony* 14 Cal 384, and *Bibee Tolai Sherob v Daxod Mullick*, 6 M I A 510, as to the somewhat expectant character of a partner's interest in the partnership business before it is actually dissolved has considerably aggravated the confusion already existing in the matter and has encouraged the contention that partnership interest does not vest in the Receiver, and this untenable contention has been sought to be further strengthened by importing the doctrine of "disposing power" enunciated in sec 2 (1) (d) of this Act and the rule of non transferability of a "bare right to sue" under sec 6 (e) of the Transfer of Property Act. It is said that inability to introduce a new partner implies want of power of disposition and that O XXI, 49, C P Code virtually gives a partner merely a right to sue for dissolution and accounts, and that if a partner has at all a power of disposition with respect to partnership assets, it is not *absolute* but *conditional* on his having assigned also his right of recovery of his share after dissolution and accounts within the meaning of *Sat Narain v Behari Lal* 51 I A 22 6 Lah 1. These considerations, it is said, exclude partnership assets from the category of *property* within the meaning of sec 2 (1) (d) and therefore non available to the Receiver. Introduction of a new partner is quite distinct from assignment of a right or interest and the word "includes" instead of "means" in sec 2 (1) (d) abundantly shows that an interest can be *property* apart from the question of 'disposing power' and other similar considerations. It will be correct to say that a partner's share in the assets of a partnership concern is "*property*" within the meaning of this section, see *Deen Dayal v Jugdeep Narain*, 4 I A 247 3 Cal 198 (P C), *Juggut Chander v Radhanath*, 10 Cal 669 (672), *Jagat Chandra v Issur Chunder*, 20 Cal 693, *Parvatheesam v Bapanna*, 13 Mad 447. A partner, though he cannot make his assignee a partner, still may give him his interest in the partnership property, *Bray v Fromant*, 22 R R 224. Cf *Jiwan Ram v Ratan Chand* 26 C W N 285 70 I C 489. These cases will not militate against the distinction between *absolute* and *conditional* power of disposition pointed out in *Sat Narain v Beharilal supra*, as no consideration of any "disposing power" at all arises in the matter. Though the receiver gets the insolvent partner's share, still he gets no preference over the joint creditors of the firm *who are to be paid in the first instance out of the partnership assets* under sec 61 (4), *infra Taylor v Fields* 4 Ves 396, *Holderness v Shackles*, 8 B & C 612, *Richardson v Gooding*, 2 Vern 293, and he will not get anything tangible until the partnership accounts have been duly taken and adjusted, *West v Skip*, 1 Ves 239. He can, of course, ask for accounts as the insolvent partner himself could do *Crostray v Collins* 15

Chand v Moti Chand, 7 Bom, 438, so all the properties which the insolvent may acquire or which may devolve upon him *after* the order of adjudication and *before* his discharge forthwith vest in the Receiver, *Mahomed Fatima v Mashuq Ali* 44 All 617 20 A L J 569 L R 3 A 406 A I R 1922 All 448 68 I C 245 The property which has long passed out of the hands of an insolvent by a valid gift has ceased to be his property and cannot vest in the receiver *Radhika Kuer v Sushil Ch* *supra* The right to receive a debt is *property* within the meaning of sec 2 (d), and vests in the Receiver under this section, *Onkarsa v Bridichand* 19 N L R 144 6 N L J 213 A I R 1923 Nag 290 73 I C 103 Therefore the Receiver is entitled to realise the insolvent's dues from his debtors *Kanhayalal's* case, *supra* Money realised in execution of a decree held by the insolvent which was attached

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Ves 218 The Receiver virtually becomes a mere tenant in common (and not a partner) with the other partners, *Barker v Goodair*, 11 Ves 98 Cf *Brickood v Miller*, 3 Mar 279 When some of the partners of a firm are adjudicated insolvent and the others are not, the Receiver cannot take exclusive possession of the assets of the firm In such a case the Receiver of the insolvent and the non-insolvent partners constitute the firm, and the Receiver, if he should so like, can get hold of the insolvent's share only, *Sannyasi Charan v Asutosh*, 42 Cal, 225 26 IC 836

Property includes personal earnings, *Jamnadas v Vinayak*, 7 N L R 19 10 IC 698 Property in this section also includes the insolvent's "salary", *Ram Chandra v Shyam Chandra*, 19 CLJ 83 18 CWN 1052 21 IC 950, see also *Ranganath v Ananda Chariar*, 21 MLJ 78, *Re Ward* 1 QB 266, *Mercer v Vane Colina*, (1900) 1 QB 130, *Re Graydon*, (1896) 1 QB 417, *Devi Prasad v Lewis* 16 ALJ 107 Actionable claims are property, *Muchiram v Ishan Chunder* 21 Cal 568, FB Property includes money, vide p 16 Moneys standing to the credit of the insolvent in a Provident Fund vest in the Official Assignee, *Re L J S Shreusbury*, 10 Bom 313 Commission earned by an insolvent in respect of policies of insurance is his property, *Jamasji v Sorabji* 10 Bom L R 579 Cf *Re Syed Kazim* 5, Rangoon, 73 (a case of money earned by a commission agent from insurance of the goods entrusted to him) Property held in trust by the insolvent will not be his property, vide at pp 15-16, ante, Cf *Re Hallett's Estate Knatchbull v Hallett*, 13 Ch D 696, *Re Syed Kazim*, supra *Smith v Pearson* (1920) LR 1 Ch 247 The interest of a reversioner expectant on a Hindu widow's death does not pass on insolvency to the Official Assignee, *Babu Anaji v Ratnoji* 21 Bom, 319 The property as defined in sec 2 (1) (d) includes any property over which or the profits of which any person has disposing power, which he may exercise for his own benefit So, in some of the cases it has been held that where a Mitakshara father is adjudicated an insolvent the whole family property (including the interest of the sons), and not merely the share he would have got on partition, vests in the official Assignee for the reason that the father has a disposing power over the whole family property which he can exercise for his own benefit see *Vunnasethi v Chidaraboyina* 26 Mad, 214, *Sardarmal v Arantayal*, 21 Bom, 205 See also *Hawan Das v O M Chine*, 44 All 310 20 ALJ 155 AIR

5 Personal earnings

6 Salary

7 Money in Provi
dent Fund

8 Commission

9 Mitakshara family
property

10 Insolvency of Karta
or Manager

1922 All 70 64 I C 076, *Lachman Das v Jai Singh* 4 Lah LJ 262 AIR 1922 Lah 300 Also *Fakirchand Motichand v Motichand Hurruckchand*, 7 Bom, 438, *Rangaiya v Thanikalla*, 10 Mad, 74, *Ram Ghulam v Kailash Narain* 1930 ALJ 453 The effect of these cases is that when a Mitakshara father is adjudicated, the Receiver can seize even the coparcenary property of his minor sons, provided the father's debts are not tainted with immorality, *Baran Das v Chiene, supra*, *Sitaran v Beni Prasad* 47 All, 263 AIR 1925 All 221 22 ALJ 1007 84 I C 790, *Kuppu Swami v Marimuthu*, 47 MLJ 487 (1924 MWN 10- AIR 1925 Mad 52 82 I C 438 Likewise, it has been held that on the bankruptcy of a member of a joint family, property in which his sons and grandsons have a right by birth is property which the Official Receiver can dispose of as property over which the insolvent has a disposing power which he may exercise for his own benefit, *Amolak Chand v Mansukh Rai* 3 Pat, 857 AIR 1925 Pat 127, *Sankaranarayana v Rajamani* 47 Mad, 462 46 MLJ 314 AIR 1924 Mad 550 83 I C 196 Cf *Shriogopal v Shukru*, 87 I C 957 Consequently, an Official Assignee, standing in the shoes of an insolvent father, can alienate family property to pay his antecedent debts provided that those debts are not tainted with illegality or immorality, *Sellamuthu In re*, 47 Mad 87 46 MLJ 86 19 L W 86 (1924) MWN 94 34 MLT 317 1924 Mad, 411 80 I C 108, FB vide also *Kuppu Swami v Marimuthu* 20 L W 783, *supra Akella v Official Receiver*, 23 L W 80 (1926) MWN 169 AIR 1926 Mad, 360 92 I C 249, *Vital v Ram Chandra* 19 NLR 128 1923 Nag 257 71 I C 327 But see *Official Assignee of Madras v Rama Chandra* 46 Mad, 54 (1922) MWN 653 16 L W 899 33 MLJ 560 1923 Mad 55 68 I C 899 Cf *Sathirasagam Pillai v Meenakshisundaram*, 14 L W 361 69 I C 485, in which it was held that the interests of the non-adjudicated members of a Hindu family do not vest in the Receiver in the first instance, though it is open to the Official Receiver to deal with their assets at a latter stage by suit or otherwise as may be lawful But where objection is raised as to the liability of the interest in the family property for the father's debts, it is the duty of the Official Receiver to decide the question before he puts up the property for sale Notification of the son's objections to the bidders at the sale is insufficient and improper, *Ramchandra v Gurraju* 18 L W 282 AIR 1924 Mad 147 According to some opinion (of questionable soundness) on the adjudication of a Mitakshara father, the share of his undivided son also vests in the Receiver, but the sons can always show that the father's debts were illegal and immoral, and therefore their interests were unaffected and could be partitioned off, *Narasimudu v Basara*, 47 MLJ 749 20

L W 946 A I R 1925 Mad 249 85 I C 439 In a recent case however under the Presidency towns Insolvency Act (III of 1909) the Judicial Committee have held that the interests of the sons do not, upon the Mitakshara father's bankruptcy, vest in the Receiver, [*Sat Narain v Beharilal*, 52 I A 22 6 Lah, 1 29 C W N 797 47 M L J 857 (1925) M W N 1 23 A L J 85 27 Bom L R 135 A I R 1925 P C 18 84 I C 883 (P C), reversing *Beharilal v Satnarain* 3 Lah 329 (F B)] because it would be a "startling proposition that the insolvency of one member of the family should of itself and immediately take from the other male members of the family their interest in the joint property and from the female members their right to maintenance and transfer the whole estate to an assignee of the insolvent for the benefit of the creditors" Also comp *Parbhulal v Bhag-an*, 29 Bom L R 473 A I R 1927 Bom 412 10 I C 464 For learned comments upon this case vide 48 M L J 35 (notes), 21 L W 35 (notes), A I R 1925 (Journal) at pp 33 44 In this case their Lordships of the Privy Council however concede that though the son's interests *do not vest* in the Receiver still it is open to the latter to proceed against the son's shares in the family property by adopting suitable procedure for the purpose Although the adjudication of the father does not operate to vest the son's interests in the Receiver, still it is competent for the latter to deal with their shares when by importing the doctrine of pious obligation, liability could be fixed on the sons for the father's debts, Cf *Official Assignee of Madras v Ram Chandra* 46 Mad, 54 &c (*supra*), *Om Prakash v Motiram* 48 All, 400 A I R 1926 All 447 24 A L J 417 94 I C 175 also *Allahabad Bank v Bhaguan Das* 48 All 343 A I R 1926 All 262 24 A L J 323 92 I C 309, see also *Trajan Keshar v Prashadh*, 6 O W N 977 A I R 1930 Oudh 36 123 I C 61, which has held, following *Satnarain's* case and dissenting from *Bauan Das v Chiene*, 44 All, 316 20 A L J 155 A I R 1922 All, 79 64 I C 976 and from *Om Prakash v Motiram*, *supra*, that an order of adjudication against a Hindu father does not vest in the Official Receiver his son's interests in the joint family property. The point has recently been fully investigated in a Full Bench decision of the Madras High Court in which it has been held that what vests in the Receiver is *not the undivided interest* of the sons, but the Hindu father's *conditional power of disposal* over his son's shares, and therefore the Receiver can sell the entire joint family property, *Balavenkataseetharama Chettiar v Official Receiver, Tanjore* 49 Mad 849 51 M L J 269 (1926) M W N 743 21 L W 345 A I R 1926 Mad 994 97 I C 825 (I B)—followed in *Pinnamamenu Basera v Garapati Narasimulu*, 51 M I J 529 A I R 1927 Mad 1 (F B) Later opinion in the Allahabad High Court is to the same effect, *Om Prakash*

v *Moti Ram*, 4S All, 400 AIR 1926 All, 447 24 ALJ 417 94 IC 175—followed in *Ram Ghulam v Kailash Narain*, [1930] ALJ 453 So it has been held that the power of a Hindu father over the family property including the son's interest therein is "property" within the meaning of this section and vests in the Receiver [*Subramania Aiyar v Krishna Aiyar*, AIR 1927 Mad 701 102 IC 266] and that where the property of a joint Hindu family vests in the Receiver on the adjudication of the father as insolvent, the sons are prevented by the doctrine of *pious obligation* from disputing the right of the Receiver to sell the property in order to liquidate the father's debts, unless they have proved that the debts were incurred for immoral purposes, *Chairman District Board Monghyr v Sheodutt Singh*, 5 Pat 476 AIR 1926 Pat 438 98 IC 364 See also *Khemchand v Naraindas* 6 Lah 493 AIR 1926 Lah 41 26 Punj LR 848 89 IC 1022 Cf *Brijnaram v Mangal Prosad* 46 All, 95, PC In the case of a joint family, though only the estate of the insolvent father vests in the Official Receiver, the latter stands in the shoes of the insolvent father and can deal with the joint property including the shares of the minor co-parceners in the same manner and to the same extent as the insolvent father could do *Official Receiver v Chiman Lal*, 31 P LR 245 123 IC 286 Only the power of the father to sell the shares of the sons passes to the Official Receiver But the power is subject to the same qualification as it is in the father's hands The Official Receiver cannot exercise the power of sale after the son's shares have been attached and the creditor may proceed with the execution so long as the Official Receiver has not exercised the power of sale, *Gopala Krishnayya v Gopalam*, 51 Mad 342 54 MLJ 674 AIR 1928 Mad 479 111 IC 505 A share in joint family property which can be attached and sold in execution is necessarily within the clutches of the Receiver, *Munshilal v Paspal Prosad* 26 OC 384 On adjudication of the adult members of a Hindu family, however, the share of a minor member does not vest in the Receiver, *Sannvasi Charan v Krishnadhan*, 49 Cal, 560 35 CLJ 498 26 CWN 954, PC Cf *Sathivasagam v Meenakshi*, 14 LW 361 69 IC 485 But in a Hindu joint trading family where there are one or more minor members and the manager is not the father and the adult members including the manager have been adjudicated insolvent, the power of the manager to dispose of the joint family property for debts incurred for trading purposes passes to and becomes exercisable by the Official Receiver so as to bind the minor's shares, *Official Receiver, Anantapur v Ramachandrappa*, 52 Mad 246 55 MLJ 721 28 LW 603 AIR 1929 Mad 166 114 IC 345 Apart from what has been said above, the

section will not authorise the Receiver to deal with the estate of the insolvent's son, *Shib Charan v Mahomed Ismail* 2 Lah L J 401 68 IC 179 Cf *Shambhu Dyal v Isar Saran* AIR 1923 All 306 75 IC 597, *Sahaj Narayan v Hajid Hussain*, 49 IC 848 (Pat) Upon bankruptcy all rights of action and all benefits arising out of the estate go to the Official

Assignee All rights arising out of the insolvent's contract vest in the Official Assignee, and he alone can bring a suit to enforce such rights, *Sa Dodin v*

Spiers, 3 Bom , 437 But the right to claim damages for the injury to the insolvent remains the insolvent's property and does not pass on to the Receiver, *Wilson v United Counties Bank*, (1920) A C 102 Where a person, prior to his adjudication, became entitled to sue for damages for breach of certain contract, his such right would pass on to the Receiver, *Firm of Motharam Dowlattram v Gopaldas*, 80 IC 141 The property of the insolvent vesting in the Receiver from the date of adjudication the insolvent cannot any more sue on a chose in action belonging to him, *Ramaswami v Ramlingam*, 22 IC 687 (Mad) Where pending a suit for specific performance, the defendant was declared an insolvent the Receiver was a necessary party and he has to execute a deed in pursuance of a decree, *Purushottam v Ponnurangam* (1913) M W N 897 15 M L J 929 21 IC 576 As to whose property a Railway Receipt is see *Fakecrappa v Thipanna*, 38 Mad , 664 30 IC 950

Upon the adjudication of a *malguzar* (under C P Tenancy Act), his *Sir* lands vest in the Receiver, *Sir lands of Malguzar* but not his occupancy rights, *Shrikishan v Nagoba*, AIR 1924 Nag 158 76 IC 634 a *malguzar* of a village becomes an occupancy tenant of the *Sir* land under sec 49 of the C P Tenancy Act, on his being declared an insolvent and the Receiver is not entitled to possession of his cultivating rights in such land A Receiver cannot apply for sanction for the sale of the cultivating rights of an insolvent in *sir* land as the rights do not vest in him under cl (5) of this section *Nagoba v Zingardc*, AIR 1929 Nag 338 121 IC 54 Under this section an occupancy holding (in U P) does not vest in the Receiver, and cannot be dealt with by an Insolvency Court, *Kalka Das v Gajju* 43 All 510 19 A L J 439 63 IC 897 (F B) In view of the provisions of ss 46 and 47 of the Chota Nagpur Tenancy Act, the Official Receiver cannot lay his hands on the house and homestead land of an insolvent, *Kamakhya Narain v Ramsaran*, 8 P L T 669 AIR 1927 Pat 351 Vide also notes at p 16, and *Chandra Benode's* case cited there

If the insolvent's property be an onerous one (e.g. a lease) the Receiver can elect either to accept or repudiate it. If he elects not to accept it, the lease does not vest in him but continues to remain with the insolvent.

11 Onerous property, e.g. a lease
 Act to incapacitate the insolvent
Mahdeo v. Jamnaram, 17 N L R
 naney is thus repudiated, the Receiver will thereafter be precluded (or estopped) from claiming any benefit thereunder, *Re Hadsley Bettenson's Representative v. Trustee* 94 L J Ch 215, *Parkinson v. Noel*, (1923) 1 K B D 117. If the disclaimer of the tenancy takes place after temporary occupation of the leasehold property, the Receiver will be personally liable to pay the rates or taxes payable for the same in the meantime *Re Listec*, (1926) 1 Ch 149. A monthly tenant of certain premises remained in possession thereof after adjudication, which had vested the tenant's interest in the Receiver, but the latter disclaimed all interest with the result that the tenancy was determined and the landlord was held entitled to get possession from the insolvent, *Re Abu Baker Haji*, 48 Bom, 580 26 Bom L R 628 A I R 1924 Bom 513.

An Insolvency Court is competent to proceed against the land of an insolvent who is a member of an agricultural tribe, *Manji v. Girdhari Lal* 2 Lah -S 61 I C 664. For the position of an insolvent agriculturist vide notes under sub-sec (5) *infra*.

Compulsory deposits in Provident Funds
 A compulsory deposit in any Government or Railway Provident Fund is not liable to attachment in execution of any decree, therefore, neither the Official

Assignee, nor any Receiver appointed under this Act is entitled to, or can lay any claim on, any such compulsory deposit, vide sec 3 of the Provident Funds Act, (XIX of 1925). See *Secretary of State v. Rajkumar*, 50 Cal, 347, also 21 A L J 454. Vide also the notes and cases under the heading "Provident Fund" under sub sec (5) below.

Political Pension
 A political pension does not vest in the Court or Receiver under this sub section. Therefore an order directing the insolvent to pay the Receiver a portion of the pension is bad in law, *Debi Prosad v. Amir Ali*, 12 O C 323 4 I C 145, *Harnam Das v. Raiyazi Begum* 20 A L J 172. Cf sec 4 of the Pensions Act, XXVIII of 1871. But pensions allowed by Government for past services are "property" and therefore assignable, *Ex parte Huggins*, L R 21 Ch D 85.

Secret formulas invented by the insolvent for the manufacture of certain articles are part of the goodwill and assets of his business and therefore he is bound to communicate them to the Receiver, *Re Keene*, (1922) 2 Ch 475 (C A). The right

to be indemnified by an Insurance Company is a chose in action, and vests in the receiver, see *Hood's Trustees v S U G Insurance Co*, (1928) 1 Ch 793

Where the insolvent for the purchase of goods entered into an agreement with a financier that he would deposit his sale proceeds to the financier's credit, it was held on his bankruptcy that the agreement did not create any right of property in either the goods or the sale proceeds amounting to an equitable assignment such as would be binding on the trustee in bankruptcy. *Palmer v Carey*, 95 L J P C 146. As to goods entrusted to a person for sale on commission vide notes and cases at p 17 ante. The Rangoon High Court has recently ruled that such goods remain the property of the owner and do not pass to the Receiver on the bankruptcy of the commission agent see *Re Syed Kazim*, 1 L R 5 Rangoon, 73

Under subsection (1), an order of adjudication relates back to and takes effect from the date of the presentation of the insolvency petition so no interest passes to the transferee by a sale of the insolvent's property after the date of such presentation though it is made before the date of adjudication order. *Sheonath Singh v Munshi Ram*, 42 All, 433 18 A L J 449 55 I C 941

The property must be of the insolvent, so a property, in the name of the insolvent but not belonging to him, will not

vest in the Receiver. Similarly, a property held by the insolvent in trust for others does not vest in the Official Assignee, *In re Vardalaca* 2 Mad, 15

See also *Hashmat Bibi v Bhaguan*, 26 All, 65, *Sannyasi v Asutosh* 42 Cal 275. *Re Nabadhip Ch Shaha*, 13 Cal 68. Cf *Smith v Pearson* (1920) L R 1 Ch 247. But if the insolvent—though not the full owner—has a disposing power over the property for his own benefit under sec 2 (1)–(d), the Receiver may lay his hand on it for the purpose of distribution see *Sardarmal v Araniyal*, 21 Bom, 205, *Nunna Sethi v Chidarabovina* 26 Mad, 214. Where the property is held not absolutely in trust but only burdened with a trust, it may vest in the Official Receiver for the benefit of creditors. *Ramappa Naidu v Lakshmanan*, 54 M L J 272 27 L W 88 (1928) M W N 86 A I R 1928 Mad 190 107 I C 786. As to *debuttur* property vide *ibid*.

Effect of the importation of the doctrine of pious obligation. We have seen above that the sons can be made liable for such of the father's debts as are not tainted with immorality, see at p 173. The result of it may be to necessitate a classification of the creditors in two groups according as their debts are moral and immoral and rateable payment of

one group only and not of the other with the funds raised from the son's properties. But there is nothing in the Act to prohibit the holding of a fund out of which certain debts of the insolvent father may be paid rateably and not the others, *Sila Ram v Beni Prosad* 22 A W N 1097 84 IC 790

Pending The question of pendency of insolvency proceedings has an important bearing in view of the fact that the bar against the institution of suits and proceedings applies only during such pendency. Insolvency proceedings would be considered as still *pending* where the Receiver has not yet been discharged and the insolvent has not applied for and obtained his discharge, *Jirani Mamoon v Ghulam Hussain*, 12 S L R 20 47 IC 771, *Mohammad Yaqub v Bujai Lal*, 2 O C 304 43 IC 262. A legal proceeding is pending as soon as commenced and until it is concluded i.e. so long as the original Court can make order in the matters in issue or to be dealt with therein, 47 IC 771 (*supra*). The phrase "Pendency of the Insolvency proceedings" must be construed with reference to the object of the enactment which is to prevent a general scramble of creditors for the assets, and this object is achieved when a final dividend is declared and distributed and then the proceeding is no longer pending *Firm of Gopal v Pahlul Mal* 9 S L R 34 30 IC 37. It has been further held in this case that the fact of the postponement of discharge of the insolvent by order of Court does not constitute *pendency* vide *ibid*. The first part of the proposition enunciated in this case is quite intelligible but why pendency should not be co-terminous with discharge is rather difficult to appreciate. At any rate the case of 9 S L R 34 has been dissented from in 12 S L R 20, *supra*. Where an application for discharge is refused, the insolvency proceedings are to be deemed as still pending for the purposes of the bar created by this section, see 41 Bom 312 (so assumed). Cf 38 IC 519 64 IC 54. This is also the view of the Rangoon High Court in *Roue & Co v Tan Thean* 2 Rang 643 84 IC 909, though in *Maung Po Toke v Maung Po Gyi* 3 Rang 492 A I R 1926 Rang 2 92 IC 142 decided without reference to 2 Rang 643 it was said that "when the Court under the provisions of sec 42, refuses the discharge of the insolvent as far as that Court is concerned the proceedings have terminated". It has recently been ruled by that High Court that the proceedings are not terminated by the refusal of discharge, *Tan Seik Ke v C A M C T Firm* 6 Rang 27 A I R 1928 Rang 109 109 IC 769. Compare notes under the heading "Refusal of discharge" under sec 44, *infra*. When the adjudication is annulled, ordinarily, the pendency determines with such annulment although, the insolvency proceedings do not always stop at the moment of annulment,

Jethaji Peraji Firm v Krishnayya, 52 Mad 648 57 M L J 116 *Vide* notes under secs 37 & 43, *infra*, also A I R 1919 Mad 480 113 I C 550 The words "during the pendency of the insolvency proceedings" by reason of their position after "shall" must qualify both the prohibitions, viz (1) that barring remedy and (2) that relating to commencement etc But this view has not found favour in *Rowe & Co v Tan Thean*, *supra* Compare *In re Dwarakadas*, 40 Bom 235 17 Bom L R 925

No Creditor shall have any remedy etc After the order of adjudication the debtor's property vests in the Receiver whose business is to collect the assets of the insolvent and distribute the same among his creditors So, the creditors so long as the Receiver is there, ought to look to him for the repayment of their debts as far as the debtor's assets permit That is why this section refuses to give the creditors any further remedy (other than what is provided here) against the debtor's property during the pendency of the insolvency proceedings without the leave of the Court, see *Lingappa v Narashima* 27 I C 6 (Mad) *Seth Sheolal v Girdharilal* A I R 1924 Nag 361 78 I C 140, *Natesa Chettiar v Annamalai Chettiar* 17 L W 319 32 M L T 157 A I R 1923 Mad 487 73 I C 213 and why no suit is allowed to be brought after adjudication without previous permission of the Court *Firm Panna Lal v Firm Hiranand*, 8 Lah 593 A I R 1918 Lah 28 102 I C 37 In fact the Insolvency Court has an exclusive jurisdiction to deal with the Insolvent's estate and all the conflicting claims with respect thereto, *Kochu Mahomed v Sankaralinga* 44 Mad 524 40 M L J 219 62 I C 40 and the provision denying remedy to a creditor herein made is based on this cardinal principle *Vide* notes under the heading "The section confers no exclusive jurisdiction," at p 31, *ante* An order of adjudication prevents an unsecured creditor from realising his debt except by receiving a dividend under the Act *Arunagiri Mudaliar v Kandaswami*, 19 L W 418 (1924) M W N 331 A I R 1924 Mad 685 The creditor should not also commence any suit or other legal proceedings against the debtor without the leave of the Court, and on such terms as the Court may impose, *Trimbak v Sheoram*, 5 N L J 144 A I R 1922 Nag 108 65 I C 941 So it has been held that a suit against an undischarged bankrupt in respect of a debt mentioned in the schedule and of which notice was duly served on the creditor is not maintainable without the leave of the Insolvency Court *Muhammed Yakub v Bijai Lal*, 20 O C 304 43 I C 262 But suits or proceedings instituted before the adjudication order, it seems, may be continued The word "commence" in this section and the word "continue" in secs 29 and 50(d) lend support to this view Also see *In re*

Harry (1887), 36 Ch D 138 (143), *Com Re Berry Duffield v Williams*, (1896) 1 Ch 939. The section does not contemplate interference with proceedings already pending *Jethalal v Ganga Ram* 8 S L R 325 29 IC 30. In an Allahabad case, however a creditor has been held to have no *locus standi* to continue an execution proceeding against his debtor after the adjudication of the latter, *Gobinda Das v Karan Singh*, 40 All, 19 16 A L J 12 43 IC 672. This is perhaps going too far, the correct procedure ought to be to stay the proceedings under sec 29. In a Bombay case [*Bharaji & Co v Jasani Rao* 31 B L R 951 AIR 1929 Bom 398] decided under the Presidency Towns Insolvency Act it has been held that where a suit is filed by a creditor against an insolvent after the order of adjudication and without the leave of the Court, the suit is not necessarily to be dismissed as not maintainable, but may be stayed. Permission to institute a suit does not necessarily imply permission to execute the decree obtained in that suit, *Bijai Inder v Charan Singh* 24 A L J 755 98 IC 525.

The words 'any suit or other legal proceeding' in the section are as wide as they could possibly be and must be held to cover the cases where the object of the suit or other legal proceedings is to obtain any

remedy against (i) the property' or (ii) the person' of the insolvent in respect of a provable debt. Cf AIR 1928 Lah 258 107 IC 608. Therefore, after a judgment debtor has become an insolvent the decree holder has no longer the right to attach his property, nor to sue for a declaration in respect of it without the leave of the Court, *Louis Dreyfus & Co v Jan Mahomed* 12 S L R 612 49 IC 121. On this principle it was maintained in a case that a suit by an attaching creditor under O XXI r 63 for a declaration that the attached property belonged to the debtor though *no remedy was sought against the property* of the debtor was a suit in respect of what might be said to have been property of the insolvent within the meaning of this section, and therefore leave of the Court was necessary for the same *Narasimma v Donepudi Subramaniam*, AIR 1927 Mad 201 98 IC 446. But this view has been reversed on Letters Patent Appeal see *Donepudi Subramaniam v Narasimma* 56 M L J 489 AIR 1929 Mad 323 119 IC 46, in which it has been held that a suit by an attaching creditor under O XXI r 63 C P C for a declaration that certain property belongs to the judgment debtor who has been adjudicated an insolvent in which no relief is sought against the insolvent debtor but in his favour and to which neither the debtor nor the receiver is a necessary party, cannot be held to be a suit falling under this section.

so as to require leave of the Court to be obtained before the institution of the suit. The section puts restriction only on such legal proceedings as would by its nature hamper or affect prejudicially the administration of the insolvent estate by the Insolvency Court. Unless the legal proceeding in question interferes with the Insolvency proceedings, there is no reason why the Insolvency Court should have control over its institution. Similarly, where a suit was instituted in respect of a provable debt without the leave of the Court, this section was held to constitute a bar thereto, *Jirani Mamooji v Gulam Hussain* 12 S L R 20 47 I C 771, see also *Mohamed Yajub v Bijai Lal* 43 I C 262, s c 20 O C 304. A suit by the creditor (without the leave of the Court) for a declaration that a transfer made by the insolvent is fraudulent (under sec 53 T P Act) is forbidden under this section, *Vasudeva v Lakshmi Narayan* 42 Mad 684 36 M L J 453 52 I C 442. A creditor cannot sue even a third party for a declaration that his alleged property really belongs to the judgment debtor and therefore is liable to attachment as it amounts to claiming a remedy against the judgment debtor. *Raman Chetty v Ma Hmu* 57 I C 803 (Bur). Likewise the attachment of the property of a judgment debtor by a creditor ceases to have any effect after adjudication of the judgment debtor as an insolvent, inasmuch as all the property of the insolvent then vests in the Receiver, *Gobindadas v Karan Singh*, 40 All, 197 16 A L J 32 43 I C 672. Cf *Balakrishna v Veeraraghava* 45 Mad, 70 41 M L J 334 (1921) M W N 775 69 I C 326. This section has no application when the "debt" is not provable under this Act and the property in question is not the property of the insolvent. *Jhunkoo Lal v Peary Lal* 39 All 204 15 A I J 49 38 I C 613 see also *Ganga Prosad v Fida Ali*, 48 I C 913. *Hiralal v Tulstram* A I R 1925 Nag 77 80 I C 946. Arrears of rent falling due after the adjudication of the tenant do not constitute a provable debt, and therefore a suit for their recovery is maintainable without the leave of the Insolvency Court. *Kuer Behari v Kalka*, 9 O L J 157 67 I C 549.

It has been maintained that where no schedule of creditors is prepared and no notice of the proceeding is served on the creditors the insolvency proceedings would be no bar to a creditor's suit to recover the amount of his debt, *Des Raj v Dunni Chand* 60 I C 588 but this view is not warranted by anything in this section.

Sub-section (2) does not apply to any suit or proceeding under the Agra Tenancy Act so a suit for rent can be maintained and a decree therein executed notwithstanding any action taken in the Insolvency Court. *Ali Ahmad v Bru Ratan* I R 11 339 (Rev). See also *Parbati v Shyam Rikh*, 41 All 296 20 A L J 147 66 I C 214.

It should however be noticed that an adjudication order does not operate as an absolute stay of all proceedings. It simply attaches a condition precedent to the institution of a suit namely, the obtaining of leave to sue from the Court. Compliance with this preliminary requisite does not involve a stay of proceeding within the meaning of section 15 of the Indian Limitation Act, so a plaintiff going to sue the insolvent on a promote cannot for the purposes of limitation deduct the time during which the insolvency proceedings were pending on the plea that his suit was stayed, *Rama Swami v Gobinda* 42 Mad, 319 36 M L J 104 49 I C 625

Under sub section (6) below the position of a secured creditor is not affected by the provisions of sub section (2). The right of a secured creditor either to commence a suit or to proceed with the suit and to proceed with the execution of his mortgage decree is not taken away by the admission of an insolvency petition or by the adjudication of the mortgagor as an insolvent, *Official Receiver, Coimbatore v Palaniswami Chetty* 48 Mad, 750 (1925) M W N 672 49 M L J 203 A I R 1925 Mad 1051 88 I C 934

Where one of two mortgagors becomes insolvent and the other is not the decree holder cannot be granted a *further* decree under O xxxiv, r 6, but he can only prove his debt in the insolvency proceedings, *Mamraj v Brij Lal* 34 All, 106 8 A L J 1241. The reason for this view is that a decree under O 34, r 6 is a *remedy* within the meaning of this section. But it is respectfully submitted that the obtaining of a *further* decree is neither a *new* proceeding nor a *remedy against the debtor's property*. The decree holder may get such a *further* decree, but he should look to the Receiver for satisfaction of the decree—of course, *rateably*. The decision in 34 All, 106, in our opinion, seems to have gone too far. The correct view in this matter appears to have been taken by the Lahore High Court which has ruled that an application under O xxxiv, r 6, C P Code for a *personal* decree is not a new proceeding but a continuation of the original suit, and does not come under the bar of this section, *Kishen Chand v Sohanlal*, 2 Lah 95 3 Lah L J 126 59 I C 610. Nor is the issue of a personal decree to the mortgagee the grant of a *remedy* within the meaning of the section *Ibid*. The absence of a decree under O xxxiv, r 6 will not in law debar a creditor from proving his debt in insolvency proceedings. All that is necessary for the purpose of insolvency proceedings is to prove the existence of the debt, *Babu Lal Sahu v Krishna Prosad*, A I R 1925 Pat 438

This section does not prevent a creditor from suing the debtor's surety even if he has deliberately refrained from proving his debt in the insolvency proceedings, *Gopal v Ganpat*, 7 N L R 122 11 I C 911. This section does not stand in the way of a creditor, who lends money to an insolvent after adjudication and consequently unable to prove it in insolvency, if he wants to bring a regular suit for recovery of his money, *Hiralal v Tulsiram*, A I R 1925 Nag 77 80 I C 946. The words "No creditor" are wide enough to disable even the petitioning creditor who cannot, therefore, execute his decree in the ordinary way, *Gouri Dutt v Shanker Lal*, 14 All, 358. Cf 30 Bom L R 455 109 I C 152. The word "creditor" here means only a creditor as defined in sec 2 (a) of the Act, and does not include a secured creditor, *Official Receiver Coimbatore v Palani Suami*, 48 Mad, 750 (1925) M W N 672 49 M L J 203 A I R 1925 Mad 1051 88 I C 934.

A suit for arrears of rent by the landlord is maintainable against his insolvent tenant, *Kalka Das v Gajju Singh* 43 All, 510 19 A L J 439 62 I C 897 (F B)—overruling *Raghubir v Ram Chandar*, 34 All 121 8 A L J 1287 12 I C 927. If the provisions of this Act do not bar the landlord's suit against his tenant before a Revenue Court under the Agra Tenancy Act it necessarily follows that they will not bar a proceeding in execution of a decree before such Court, *Parbati v Shyam Rikh*, 44 All, 296 20 A L J 147 66 I C 244. Cf *Ali Ahmad v Brij Ratan*, L R 3 A 339 (Rev). But see *Govinda Ram v Kunj Behari* 46 All, 398 (408) F B 22 A L J 217 which has held that in a suit for profits in the Revenue Court brought by the assignee of the profits which had accrued due to a co sharer (the co sharer having made the assignment after his adjudication) a plea can be taken in the Revenue Court that nothing passed by the assignment as the insolvent's assets had vested in the Receiver. Where one of several co tenants becomes an insolvent, the remaining tenants are not entitled to plead in abatement and a suit for rent by the landlord is maintainable against them. "Replication to a plea of non joinder that a co contractor was discharged by bankruptcy or an order of discharge was a perfectly good replication to a plea in abatement," *Amrita Lal v Narain Chandra*, 30 C L J, 515 (517) 53 I C 973.

The property of an insolvent inherited from his deceased father like his other properties vests in the Receiver and is immune from execution and this immunity attaches to the property even when the execution creditor got his decree against the deceased father, *Gadi Lakshmi Narashimam v Pillalamarri Jaganadha*, 18 M L T 147 30 I C 256. The reason for this rule is that the debt of the deceased father

constitutes no charge upon his property so as to prevent his heir from disposing of it *Iccasokka Raju v Pappiah* 26 Mad, 792 15 M L J 258

A father was joined as a necessary party, but no relief was actually sought against him but only against the sons. The plaintiff did not seek relief against any of the properties which had come into the hands of the Receiver, held the suit was maintainable and the joining of the Receiver as a party would have been sufficient to cure any irregularity *Sambhu Dyal v Issar Saran* A I R 1923 All 306 5 I C 59

Where an unpaid vendor instituted a suit against his vendee for a lien on the property sold and the vendee became an insolvent before the vendor got a decree without impleading the Receiver it was held that the decree did not bind the Receiver and the sale in execution of such decree did not prevail against the sale by him *Mokshagunam Subramania v Ramkrishna* 42 M L J 426 16 L W 43 A I R (1922) Mad 335 5 I C 35. Where in an execution case it was settled by amicable arrangement that the decree holder will allow payment by instalment on the judgment debtor furnishing security and a consent order was drawn up in accordance therewith the order will be given effect to notwithstanding the subsequent bankruptcy of the judgment debtor *Allan Bros v Shaik Jooman* 2 Rang 63 A I R 195 Rang 189 4 Bur L J 37 85 I C 291

Suit against individual partner in case of adjudication of Firm *Honda Ram v Chiman Lal* cited at p 164, ante

Question of notice Sub-section (2) does not say whether the prohibition prescribed by it is limited only to the creditors who have got notice of the insolvency proceedings or not. Though the general words of this sub section do not warrant such a restricted interpretation still in an Oudh case it has been held that the prohibition affects only the creditor tainted with notice of the insolvency proceedings and does not apply to those creditors to whom no notice has been given *Fida Husain v Collector of Shahjahanpur* 1 O C 267 25 I C 208

Arrest The section does not say anything as to the arrest of the insolvent in execution of a decree. It should be noted that under the Act of 1907 the adjudicated insolvent enjoyed an immunity from arrest but under the present Act this immunity has been taken away and the old provisions about the insolvent's release have been deliberately omitted. *vide* notes at p 161 ante also read the learned article in A I R 1926 Journal 75. So under the existing law a judgment debtor is not normally immune from arrest or detention in execution of a decree until he has obtained a

protection order from the Insolvency Court, *Haveli Ram v /amundara Bank*, AIR 1929 Lah 453 117 IC 373 See also *Mahomed Roshan v Mohiuddin*, 31 Bom LR 206 AIR 1929 Bom 135 118 IC 791 The mere adjudication of a judgment debtor as an insolvent does not prevent his arrest in execution of a decree obtained against him Under the old Act (of 1907) the insolvent was entitled to get protection from arrest upon his adjudication, and if he was adjudicated under that Act, his such right will not be abrogated by the operation of the new Act, *Solayappa Naicker v Shunmugasundaram*, 50 MLJ 237 AIR 1926 Mad, 510 1926 MWN 281 93 IC 3 See also *Radhey Shyam v Mohammed Taqi*, AIR 1923 Oudh, 36 72 IC 911 "If it had been the intention of the Legislature to protect insolvents, the provisions of sec 31 which permit an insolvent to apply to the Insolvency Court for a protection order, would have been superfluous," *Hari Ram v Sri Krishan*, 49 All 201 25 ALJ 152 AIR 1927 All 418 100 IC 320 Read the very learned comments on this case in AIR 1928 Journal 38, at p 39 There is no provision in the Act to pass orders to prevent the arrest of a petitioner pending the hearing of an insolvency petition, *Jeuraj Kharewalla v Lalbhai* 30 CWN 834 AIR 1926 Cal 1011 96 IC 131, *Kishan Chand v E D Sassoon* 83 PWR 1910 81 PLR 1910 7 IC 351 Under the law as it stands now, the Creditor can, proceed to arrest an insolvent in execution of his decree as if no adjudication had taken place, *Hari Ram v Sri Krishan*, *supra*, *Radhey Shyam v Mohammad Taqi*, *supra* In a Lahore case, however, it has been held that a decree holder is not competent to take out execution against the person of the insolvent judgment debtor without obtaining the leave of the Court, *Firm Pratap Singh v Firm of Meera Singh* AIR 1928 Lah 258 107 IC 608 Comp Tan Sheik Ke v C A M C T Firm, 6 Rang 27 AIR 1928 Rang 109 109 IC 769, which virtually takes the same view Where arrest is allowed the Court should give its reasons in order to enable the appellate Court to scrutinise the propriety of the order and of the discretion exercised in making it, *Mullapalli Gopalan v Koppothul Gopalan* 22 LW 202 AIR 1925 Mad 915 (1925) MWN 612 91 IC 31 Where other remedies are open to punish the insolvent, an order for personal seizure or arrest is not proper, *Nagoremull Modi v Lachmi Narain* 45 CLJ 531 AIR 1929 Cal 144 113 IC 854 The object of sec 55 (1) of C P C is to give the debtor time to apply to Insolvency Court but if an insolvency proceeding has already been started there would be no sense in giving him further time *Kishan Chand v E D Sassoon*, 7 IC 351 (*supra*) As to the insolvent's liability to be arrested after the termination

of the insolvency proceedings by an order of refusal of discharge, see *Maung Po Toke v Maung Po Gyi*, 3 Rang 492 AIR 1926 Rang 2 02 IC 142 Before the immunity from protection is taken away from the insolvent by an order of his arrest, a notice must be served upon him to show cause why he should not be arrested, *Seshayangar v Venkata Chalem*, 5 L W 220 31 IC 15

Suits and appeals by or against Insolvent

The insolvent's right of action, unless it be a "bare right to sue" (as for instance in the case of *personal injuries* or the like) passes to the trustee Cf *Molram*

Those by the insolvent *Daulatram v Pahlay Rai*, AIR 1925 Sind 159 80 IC 141

But if the trustee does not interfere, the insolvent can, of course, carry on the action, subject to an obligation to make over the amount to be recovered in the action to the trustee Cf *Omar Bahadur v Khaja Muhammad* AIR 1924 Pat 667 79 IC 56 *Wadling v Oliphant*, (18-5) 1 Q B D 145, *Buchan v Hill* (1888) WN 233 See also the cases cited at pp 165 66 But the right to claim damages for injury to *Person or Reputation* of the insolvent does not pass to the trustee in bankruptcy but remains in the bankrupt *Wilson v United Counties Bank Ltd* LR 1900 AC 102 In India

Conflict of opinion there is a conflict of opinion with respect to this question In *Kristo Komul v Suresh Chandra* 8 Cal 556 12

CLR 253, a prior purchaser from an undischarged insolvent was held to have priority over a subsequent purchaser from the Official Assignee This view was approved in *Sriramulu v Andalimal*, 30 Mad, 140 17 MLJ 14 In *Ramanath Iyer v Nagendra* 45 MLJ 827 (following 30 Mad 140) the insolvent's right to maintain a suit in respect of after-acquired property was conceded For a contrary view see *Rowlandson v Champion*, 17 Mad, 21, *A B Miller v Abinas Chandra* 2 CWN 372 Vide the notes and cases under sub-sec (4) under the heading "After acquired property" The Patna High Court has held recently that a person who has been declared an insolvent cannot, while his estate is in the hands of the Receiver, maintain a suit in his own name, even though the Receiver has refused to bring such a suit, *Khalafut Hossain v Ajmal Hossain*, 54 IC 699 Cf *Umar Bahadur v Khaja Muhammad*, AIR 1924 Pat 667 79 IC 56 The Madras High Court concedes that bankruptcy entails civil death and loss of right of action on the insolvent, but maintains that such disability does not take away the insolvent's *locus standi* to prosecute an appeal against a decree or order made against him, *Konda Pillai v Didurant Ramchandra* (1921) MWV

Those against the insolvent 31 Bom L R 357 118 IC 252, cited at p 165, ante As to the insolvent's right to maintain a suit to set aside a fraudulent decree, see *Andrew Rozario v Ebrahim Serang*, 48 Bom, 583 26 Bom L R 695 As regards suits etc against the insolvent vide under the heading "No creditor shall have any remedy etc"

Leave of the Court The provision about the leave of the Court has been enacted for the purpose of enabling the Court to keep a proper control over the administration of the insolvent estate, *Louis Dreyfus v Jan Mahomed*, 49 IC 421 A suit against an insolvent without the leave of the Insolvency Court is not maintainable, *Majidan v Chatru Mal*, 110 IC 386 A creditor's suit is not absolutely forbidden under this section, if may, however, be commenced with the leave of the Court Cf *Balmukand v Birj Lal*, 36 IC 1024 (All), *Ismailji v Manghanmal*, 5 SLR 80 12 IC 622, *Rama Swami v Gobinda Swami*, 42 Mad, 319 25 MLT 247 49 IC 626 The "leave" to commence a suit should be obtained before the institution of the suit and cannot be obtained subsequently to its institution, *Juanji Mamooji v Ghulam Hussain*, 47 IC 771, *Trimbak v Sheoram*, 5 NLR 144 AIR 1922 Nag 108 65 IC 941 19 NLR 126 Cf 52 MLJ 53(n), *Re Darkadas*, 40 Bom 235 17 Bom L R 925 This means that the necessary leave is a mandatory condition precedent to the institution of a suit, *Cuddappa Ghose Khan v Bala Subba Routhier*, 51 Mad 833 53 MLJ 412 (1928) MWN 122 26 LW 318 AIR 1927 Mad 925 105 IC 109, and that the initial absence of leave cannot be condoned or does not become unnecessary because the insolvency proceedings are annulled subsequently, *Ponnusami Chettiar v Kaliaperumal*, AIR 1929 Mad 480 113 IC 550 For a contrary view see *Firm of Gopal Das v Pahlumal* 9 SLR 34 30 IC 37, in which it has been held that a suit instituted without leave can be validated by obtaining leave subsequently It seems that if a person institutes a suit, without previously obtaining the necessary leave he should apply to the Court in which his suit is pending for leave to continue his suit see *Cuddappa Ghose Khan's case*, *supra* Objection as to want of leave can always be waived, *Narasimham v Donepudi Subramaniam* AIR 1927 Mad 201 98 IC 446 So a decree obtained without leave will not be a nullity, *Ibid* Absence of the necessary leave does not cut at the root of the Court's jurisdiction to entertain the suit *Donepudi Subramanyam v Nune Narasimham* 56 MLJ 489 AIR 1929 Mad 323 119 IC 46

In consequence the decree made in the suit does not become a nullity and cannot be challenged in a subsequent suit on the ground of want of leave *Ibid*. The Court can give leave only to commence a suit. It cannot give leave to continue a suit which has been instituted contrary to a rule of law *Jirani Mamooji v Ghulam Hussain* 47 IC 771, *Umar Sharif v Juala Prasad* AIR 1974 Nag 60 79 IC 662. Permission to institute a suit does not cover permission to execute the decree obtained in such suit against the Receiver, *Bijal Inder Singh v Charan Singh* AIR 1976 All 640 24 ALJ 35 OS IC 525. But see *Solavappa Vaicker v Shunmu gasundaram* 50 MLJ 2 (196) MW 281 AIR 196 Mad 510 OS IC 3—following *Natesa Chettiar v Annamalai Chettiar* AIR 1973 Mad 48 32 MLT 157 1- LW 319 - IC 215 in which it has been held that after adjudication and before discharge all creditors whether on the schedule or not are prohibited from taking execution proceedings against the person and property of the insolvent except with the leave of the Court. Where the creditor proposes to execute his decree at his own cost and risk and upon an undertaking to hand over to the Receiver all moneys realised in execution for the benefit of the general body of creditors the leave should be granted *Kailas v Kantiram* 37 IC 99 (Cal). Where no schedule of creditors is prepared nor notice of the insolvency proceedings served on the creditor the latter will not be precluded from bringing a suit against the insolvent to recover the amount of his debt *Desraj v Dunn Chand* 60 IC 588 (Lah). There is no prohibition in the Act to a creditor going on with a suit or proceeding already pending at the date of the adjudication *Ashghari Begam v Muhammad Yusuf* 61 IC 534.

Where during the pendency of the insolvency proceedings but before the adjudication order a creditor in execution of his decree gets his debtor's properties attached and sold he is entitled as against the Receiver to the benefit of the proceeds of execution of his own decree *Srichand v Murari* 34 All 678 10 ALJ 25 16 IC 183. See also *Badri Das v Sleonath* 28 IC 816 but if the property be simply attached and not sold the creditor will have no priority over the Receiver *Frederick v Madan Copal* 9 Cal 428 FB. See also *Soobul Chunder v Russick* 11 Cal 15. The case of *Srichand v Murari* 34 All 628 seems to have been decided under old sec 24 (now sec 51) without reference to the provision that an adjudication order takes effect from the date of presentation of the insolvency petition. Even that sec 34 has been modified by the substitution of the words 'the date of the admission of the petition in the place of the order of adjudication' occurring in the old section. The

case of *Srichand* (34 All, 628) is therefore no longer good law Cf *Sheonath Singh v Munshiram*, 18 A L J 449 55 IC 941

A third person who is not a creditor of the insolvent, but who claims adversely to him, is not affected by this section, and is not therefore bound to obtain leave of the Court before suing the Receiver, *Halima v Mathradas Ramchand*, 10 S L R 179 40 IC 122

By reason of sub sec (6), a secured creditor is free to institute a suit against the insolvent without leave of the Court, *Bas Kashi v Chunilal* 31 Bom L R 1190 AIR 1930 Bom 11 122 IC 857 Leave of the Court is not necessary as a condition precedent to the institution of a suit for the recovery of a debt which is not provable in insolvency, *Sisram v Ram Chander*, [1930] A L J 350

Receiver if bound by decree against Insolvent A decree obtained against the insolvent is not binding upon the Receiver in insolvency There is always the possibility of its having been collusive between the parties when the judgment debtor would not have cared what the amount of the decree against him was, *Shahamat Ali v Rahim Bux*, L R 3 A 436 Cf *Kalachand Banerji v Jagannath Marwari*, 54 IA 190 54 Cal, 595 31 C W N 741 45 C L J 544 29 Bom L R 882 25 A L J 621 52 M L J 734 AIR 1927 P C 108 101 IC 442 (P C) in which it has been held that a foreclosure decree without impleading the receiver is not *res judicata* against him But where during the pendency of a mortgage suit the mortgagor is adjudicated an insolvent and a preliminary decree is made without impleading the Receiver, who is brought on the record subsequent to the preliminary decree and suffers a final decree to be made without objection, the decree will not be invalid on that account, *Kandasami Chelliar v Jayapandi Athithar* 26 L W 47 AIR 1927 Mad 609 101 IC 78 The receiver is not bound by any decree creating a charge on the bankrupt's property, subsequent to his adjudication *Tulsi Ram v Mahomed Araf*, AIR 1928 Lah 738 109 IC 373 Comp *Nainer Rowther v Kuppal Pichai* (1929) M W N 168 AIR 1929 Mad 609

Absence of leave does not render decree a nullity The fact that no leave is obtained for a suit under this section does not render the decree in such suit a nullity, where no objection was taken to such want of leave *Narasimma v Donepudi Subramaniam*, AIR 1927 Mad, 201 98 IC 446 But in a Nagpur case it has been held that the permission of a Court to sue is contingent on the suit being brought and cannot be given afterwards and the proceedings started without such permission are *ultra vires* and do not constitute *res*

judicata Trimbak v Sheoram, 5 N L J. 144 A I R 1922 Nag. 108. 19 N L R 126 65 I C 941.

What this section does not bar The prohibition in clause (2) does not affect the creditors who have no notice of the insolvency petition, 17 O C 267 25 I C 708 The correctness of this view is open to grave doubt, see at p 183, *ante* It does not affect also an attachment before adjudication, *Madhu v Khutish*, 42 Cal. 289 30 I C 82, where no schedule of creditors has been prepared, the insolvency proceedings will be no bar to a suit by the creditor, *Des Raj v Duni Chand* 60 I C 588 (Lah) This section does not prevent a creditor from suing the debtor's surety even if he has deliberately refrained from proving his debt in the insolvency proceedings, *Gopal v Ganpat* 7 N L R 122 11 I C 911 It does not prohibit the continuation of a suit or a proceeding already pending at the date of adjudication, *Ashgar Begam v Muhammad Yusuf*, 61 I C 534 Where a bond stands in the name of a person but really belongs to an insolvent, the former will not be prevented from suing on the bond by this section if the Receiver does not interfere, *Manik Rao v Nurhassan* A I R 1925 Nag 376 88 I C 254 The section does not bar a suit for rent under the Agra Tenancy Act, *Ali Ahmad v Brij Ratan* L R 3 A 339 (Rev) The bar of this section does not operate when the debt is not provable under sec 34, *Kesheorao v Goindrao* 68 I C 340, see *Beharilal v Kalka* 9 O L J 157 The insolvency of a judgment debtor does not render it incompetent for him to continue the proceedings by way of appeal, *Kondapalli v Didurant*, 13 L W 616 (1921) M W N 535 62 I C 854 Nor does it incapacitate him from serving an ejectment notice on his tenant, *Rangai v Deokinandan*, L R 5 O 77 A person seeking to set aside an *ex parte* decree against him can proceed with his suit, notwithstanding the fact that during the pendency of his suit he has become an insolvent, *Ashgar Begam v Muhammad Yusuf*, 61 I C 534 As to the power of the insolvent to maintain a suit in respect of property devolving upon him subsequent to adjudication, see the cases at p 194, *infra* The jurisdiction of a Civil Court to try a suit in respect of a debt or liability incurred by an insolvent after the order of an adjudication is not barred by the provisions of this section, *Heralal v Talsaram* 22 N L R 118 A I R 1925 Nag 79 Sub sec (2) would be no bar to an application in execution, *Maung Po Toke v Maung Po Gyi* 3 Rangoon, 492 It does not bar a suit for rent *Kalka Das v Gajju*, 43 All. 510 62 I C 897 (F B)

Sub section (3) : Reputed ownership For the purposes of sub-sec (2) all goods in the possession order or disposition of the insolvent on the date of the presentation of

the insolvency petition, by the *consent* and *permission* of the true owner, and of which he is the reputed owner, shall be deemed to be the insolvent's property, see *Ex parte Watkins*, L R 8 Ch App 520, also *Joy v Campbell*, (1804) 1 Sch & Lef 328, *Powell's case*, (1929) 1 Ch 137. This rule of law is akin to what we ordinarily call the rule of Estoppel, and is embodied in the Act for the purpose of checking dishonest attempts to obtain false credits, *Colonial Bank v Whinney*, (1886) 11 App Cas 426 (440), also (1885) 30 Ch D 281. It is probably the only instance in our law in which the property of one man is made answerable for the debts of another man, *Ibid*. Consult *Sharman v Mason*, (1899) 2 Q B 6-9 discussed in *In re William Watson & Co*, (1904) 2 K B 753. Where the true owner allows the goods to pass off as belonging to the insolvent it is but just that the goods should be available for the benefit of the creditors. So it has been held in an old Calcutta case that "where goods are in the order and disposition of any person under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods, who has permitted him to obtain false credit, must suffer the penalty of losing such goods for the benefit of those who have given the credit." *In re Marshall*, 7 Cal, 421, *Boileau v Miller*, 10 C L R 591 (on appeal from Cal 421), see also *Ex parte Wingfield*, L R 10 Ch D 591. *Re Dwarkanath Mitter*, 3 Cal, 58, see also *MacLeod v Kilabhoj*, 25 Bom, 559 (665). The property must be in the order and disposition of the debtor, otherwise the above doctrine will not apply. For instance, the insolvent assigns a debt and the assignee gives notice of the assignment to the person owing the debt, this notice by the assignee will take it out of the order or disposition of the debtor, *Punithavelu v Bhasyam* 25 Mad, 406, following 2 Bom, 542, *infra* and followed in *Mercantile Bank v Official Assignee*, 39 Mad 250. See also *In re Morgan*, 6 Cal 633. Similarly, where the insolvent consigns goods to a person and makes over the railway receipt to him, the goods are no longer in the possession or disposition of the insolvent, *Fakcrappa v Thippana*, 38 Mad, 664. 30 IC 950. Where certain shares belonging to a debtor were transferred to another person without any transfer deed or without any notice to the company, it was held that these shares were in the order and disposition of the debtor and upon his insolvency, vested in the Official Assignee, *Bharan Mulji v Karasji*, 2 Bom, 542. The goods which the insolvent agrees to part with before the order of adjudication and for which he had received consideration though still in his possession pending delivery are not in the order or disposition of the insolvent, *Re Bansidhar Khetry*, 2 Cal 359. By reason of sec 28 (6), the doctrine of

reputed ownership of this clause can have no operation to affect the power of a secured creditor. Therefore the principle that if the mortgage allows the mortgaged goods to be in the possession of the mortgagor until the latter's bankruptcy the goods pass to the Receiver will not apply. *Shamlal v Phanindra Nath* AIR 1911 Cal 532 77 IC 467. The principle of this case will be very

Hire purchase system important with respect to goods or articles purchased on hire purchase system. In England an inference of ownership may arise in respect of articles found in the possession of the bankrupt though on a hire purchase agreement see *Re Kaufman Segal and Deml*, (1911) 2 Ch 89. For a contrary view see *Ex parte Emerson* 41 LJ (KB) 20. In India the rule of *Shamlal v Phanindra Nath supra* will apply in such a case and the Receiver in bankruptcy gets no advantage from the transaction. It has been pointed out also in *Moti Ram v Rodwell* 21 ALJ 32 AIR 1923 All 159 that sub sec (6) clearly shows that no property over which a secured creditor has a legal charge shall be affected by sub-sec (3). Possession order or disposition of the insolvent must be in relation to his trade or business. Therefore where an insolvent purchases a 'pleasure motor car' on hire and purchase system primarily for his private use though he occasionally uses it for business purposes (for which there is no consent) the Receiver apart from the rule in *Shamlal's case (supra)* gets no preference over the vendor see *Lamb v Wright & Co* (1924) 1 KB 85. Cf also the provision of sec 38 (c) of the Bankruptcy Act 1914 and the cases thereunder. Also see *Re Collins* (1925) 1 Ch 556 *Re Wethered*, (1926) 1 Ch 167. The point of time (viz the date of the presentation of the petition) with reference to which the question of reputation is to be regarded should also be taken note of. Cf *Aburrahammal v Official Assignee* 47 Mad 215. Possession order or disposition by an insolvent in order to defeat the title of the true owner must be actual possession or disposition etc. apparent possession is not sufficient. *Ex parte National G A & Co* (188) LR 10 Ch D 408. If the property be in the actual possession and reputed ownership of the debtor, it will not cease to be regarded as his property simply because the true owner has kept a watch over it. *In Re Brown*, 12 Cal 629. But a bona fide demand of possession by the true owner completely negatives the hypothesis of bankrupt's possession with the consent of the true owner. *Ex parte Harris* (182) 8 Ch App 48. *Ex parte Montagu* (18-6) 1 Ch D 554. Where the circumstances of a case show that the true owner has resumed possession or withdrawn his consent there is no room for the

operation of the doctrine, 10 Ch D 408, *supra* Where a bond stands in the name of a son, and there is no evidence as to the source of the consideration money or of its existence on the date of adjudication, there is no presumption of ownership in the insolvent father, *Manik Rao v Nurhassan*, AIR 1925 Nag 376 88 IC 254 As to the mode of ascertaining whether any particular debt sustains the character of a debt due to a bankrupt in the course of his business, see *Re Wethered Ex parte Salaman* (1926) 1 Ch 167 (174, 175) Holding the property as a mere commission agent will make the owner a reputed owner, *Cf Official Assignee v Zollkoffer & Co*, 6 Bur LJ 9, *Re Murray*, 3 Cal, 59

The real test for the doctrine is whether the reputation of ownership or the visible possession of

Test for the Doctrine the property has enabled the insolvent to get false credit, as it is on this principle that the whole doctrine is founded *Cf Fresency v Wells*, (1857) 26 LJCP 129 Thus, where a commission agent gets credit for the goods entrusted to him for sale, this doctrine will apply *In re Messrs Kadibhoy Ismailji*, 5 SLR 78 11 IC 14 *Cf Re Syed Kazim*, 5 Rangoon, 73 Mere possession cannot raise a reputation of ownership, *Ex parte Watkins* LR 8 Ch 520 *Cf Simons & Co v Durand Trustee*, 97 LJKB 537 The Court is bound to come to the conclusion that the inference of ownership which would be drawn by the public is not merely one that will probably arise but is one that "must" arise, *In re Kaufman Segal & Domb* (1923) 2 Ch 89 The operation of the doctrine may be excluded by special trade customs, *In re Ford, Ex parte The Trustee* (1929) 1 Ch 134 97 LJ Ch 334 The circumstances that have been stated in sub-sec (3) as pre-

Onus of Proof

judicing the true owner are all questions of fact and the onus is on the Receiver claiming the property to show that those circumstances exist, so as to warrant an imputation of ownership to the insolvent, *Cf Ex parte Watkins, In re Couston* (1873) 8 Ch App 520, *In re William Watson & Co* (1904) 2 KB 753 (56) See also *Manik Rao v Nur Hasan*, AIR 1925 Nag 376 88 IC 254, *In re Young Hamilton & Co* (1905) 2 KB 381 (390)

The doctrine embodied in this section applies only in respect of goods or chattels

Fixtures are not goods and chattels and therefore the doctrine of reputed ownership does not apply to them, *MacLeod v Akabhoj* 25 Bom, 659 3 Bom LR 426, *Horn v Baker* (1808) 2 Smiths L C 11th Ed 232 The fact that fixtures

are removable by a tenant makes no difference, they are still fixtures, to which the doctrine does not apply (*Ibid*) Fixtures, which are not immoveable property under sec 3 of the Registration Act, not being "permanently fastened," are not goods and are therefore excluded from the doctrine (*Ibid*) A heavy oil press whose shafts and pulleys are bolted on to the posts of the house, though capable of removal by unscrewing the bolts, does not fall within the meaning of the word goods and therefore is not subject to the rules of reputed ownership, *On Pe v Kun Ti*, 14 IC 447 6 LBR 44 Where land and chattels are leased together, if the Receiver disclaims the land as an onerous property, he cannot claim the chattels by virtue of the doctrine of Reputed Ownership, *Ex parte Allen, Re Fussell*, (1880) 20 Ch D 341 Shares in companies are transferable by deeds and therefore are not affected by the rule of this sub-section, (1886) 11 App Cas 426, *supra* An equity of redemption in goods is not "goods" within the meaning of this sub-section, [*Official Assignee v Iallappa Chetti*, 45 Mad 23S], but an equity of redemption in a life policy is, (1921) 2 Ir R 377

It should be noticed that sec 28 (3) is directed against the "true owner," who negligently allows the insolvent to retain goods in the insolvent's possession, order or disposition as the reputed owner So it will not apply to the case of a person who is not the true owner, *Fakeerappa v Thippana* 38 Mad, 664 30 IC 950 The words "true owner," however, include the owner of an equitable interest and that there can also be a reputed owner of that interest and that reputed owner can be the insolvent himself, i.e. the legal owner of the property, *Mercantile Bank of India v Official Assignee*, 39 Mad 250

Sub-sec. (4): After-acquired property Under this sub-section all property which is acquired by, or devolves on, the insolvent after the order of adjudication and before his discharge forthwith vests in the Court or the Receiver and is divisible in the manner set forth in sub-section (2), *Mahomed Fatima v Mohammad Mashuq*, 44 All 617 20 ALJ 569 AIR 1922 All 448 68 IC 245 So, where after the adjudication of the father, his sons acquire a property and allows him to hold it as a co-owner the father's interest in such property as such co-owner would pass to the Receiver, *Parbhulal v Bhagvan*, 29 Bom LR 473 AIR 1927 Bom 412 102 IC 464 Under Chapter XX of C P Code of 1882, various cases were decided with respect to the position of an insolvent in relation to his after-acquired property and in almost all of them it was held that the insolvent retained absolute control over such property, of course, subject to the right and claim of the Official Assignee That is, an undischarged insolvent has, in respect of his after acquired property, a right

against all the world except the Official Assignee, *Sriramulu v Andalammal*, 30 Mad, 145 17 M L J 14 *Kuppu Ram v Nagendra Ayyar*, 45 M L J 827 A I R 1924 Mad 225 76 I C 805 So long as the trustee in bankruptcy did not inter-

vene all transactions and dealings by the insolvent with respect to his after acquired property were valid, see *Kristo Comul v Suresh*, 8 Cal, 556

12 C L R 253, *Abdul Karim v Official*

Assignee, 28 Mad, 168, *Dasarathey Singha v Mahamulya*

Ash, 47 Cal, 901 60 I C 977, following *Herbert v Sayer*

(1844) 5 Q B 964, *Sriramulu v Andalammal*, 30 Mad 145

s c 17 M L J 14, *Alimahamed v Vadilal*, 43 Bom, 890 (follow-

ing *Cohen v Mitchell* 1890, 25 Q B D 262), *Dastru Mahar*

v Official Receiver, A I R 1927 Nag 16 97 I C 980, *Ci*

Umar Bahadur v Khaja Mohamad, 2 P L R 276 (1923) Pat

287 79 I C 56 *Chhote Lal v Kedarnath*, 46 All 565 22

A L J 455 A I R 1924 All 703 84 I C 289, *Lakshmi*

Chand v Kedar Nath A I R 1928 All 12 99 I C 476

Balibhasdas v Mirchilal 48 I C 236 (Nag), *Jagdish Narain*

v Ramsakal Kuer, 8 Pat 478 A I R 1929 Pat 97 114 I C

465, *Debi Prasad v Amir Ali*, 12 O C 323 4 I C 145, *Ram*

Bulluv v Bickraj 6 L B R 174 19 I C 88, *Macleod v B B*

& C I Ry Co, 7 Bom L R 618, *In re Donaghue*, 19 Bom,

232, *Fatima v Fatima*, 16 Bom, 452, *Jamnadas v Vinayak*

10 I C 698, s c 7 N L R 19, *Murray v E B M*, *Flotilla*

Co, 46 Cal 156 22 C W N 1018 *Contra*, *Rowlandson v*

Champion 17 Mad, 21, *A B Miller v Abinash Chunder*, 2

C W N 372, *Hill v Settle*, (1917) 1 Ch 319, see also *Ring*

wood, 14th Ed, p 97 and sec 47 of the Eng Bankruptcy Act

But the Insolvency Act has modified such of the above decisions

as give the debtor the right of alienation subject to the Official

Assignee's claim by laying down that the after acquired pro-

perty vests in the Court or the Receiver the moment the acqui-

sition takes place So that after such vesting, the debtor ceases

to be the owner of the property, and dealings by him with

respect thereto become *ipso facto* void Read the luminous

judgment of Rutledge C J in *Ma Phaw v Maung Bhatta*,

I L R 4 Rangoon 125 A I R 1926 Rang 179 97 I C 21

[dissented from in 8 Pat 4-8 *supra*] The Judicial Committee

also have recently held that property acquired by or devolving

on an insolvent after adjudication and before discharge vests

in the Receiver who alone has the right to deal with it

Kala Chand Banerji v Jayannath, 31 C W N 741 101 I C

442 (P C) For the same reason moneys paid into a bank by a

bankrupt after adjudication will be regarded as the property

of the trustee in bankruptcy and the bank will not be entitled

to make thereafter any payment to the bankrupt None of

the transactions between the bank and the bankrupt after the date of the receiving order would be protected as against the said trustee, *Re Higzell, Ex parte Hart*, (1921) 2 K B 835. An insolvent, while his estate is in the hands of the Receiver, cannot maintain a suit in his own name, *Khilsal Hussain v Azmat Hussain*, 54 I C 699. But the Madras High Court has maintained, following 30 Mad 145, a contrary view, and held that in the case of an after acquired property the insolvent has a right of suit subject to the intervention of the Receiver, *Ramanath Iyer v Nagendra*, 45 M L J 827 18 L W 868 A I R 1924 Mad 223. Cf *Salva Kumar v Manager, Benares Bank*, 22 C W N 700 46 I C 335. The exposition of the law as laid down in *Cohen v Mitchell*, (1890) 25 Q B D 262, *supra*, has attained such a strength of currency by persistent re-iteration in our law Courts, that it will be difficult for some time to come to get out of it. But the following observation of the P C in 31 C W N 741, ("The Court only acts through a Receiver, and any estate acquired by or devolving on an insolvent is vested in him as from the date of acquisition or devolution whatever the date of the Receiver's actual appointment"), however, we hope, will encourage a departure from the old view. After the vesting of the after acquired property the provisions of sub section (2) will apply, so that such property then becomes divisible among the creditors and the creditors lose all remedy against it. As to whether an insolvent can after bankruptcy make contributions to a Provident Fund, see *Macleod v B B & C I Ry Co*, *supra*.

This sub-section enables the Court or the Receiver to appropriate a portion of the salary or income of the insolvent after his adjudication for the benefit of his creditor, *Dev Prosad v Lewis* 40 All 213 43 I C 984, *Ramchandra v Shyama Charan* 19 C L J 83 18 C W N 1052 21 I C 950. One half of the insolvent's salary can be appropriated under sec 60 of the C P Code read with this section (*Ibid*), see also *Tulsilal v Girsham* 38 I C 410. "Property in this sub section does not exclude personal earnings over and above what is properly necessary for the debtor's support *Jamnadas v Vinayak* - N L R 19 10 I C 698. *Vide* notes under sec 66 below.

This sub section will not affect the provision of Mahomedan Law according to which a bequest by a Mahomedan in favour of an heir may be operative when the other heirs consent to it notwithstanding the fact that such consenting heirs are insolvent. Thus this sub section will have no application in such a case because the consent of the insolvent's heirs does not operate like a transfer of their interest to the prejudice of the Receiver in bankruptcy but amounts to a mere removal

of a bar in the way of the bequest taking full effect, see *Azizunnessa v Chiene*, 42 All, 593 59 IC 206 18 ALJ 745

English Law In England, the general rule is that the right of action except for personal injuries and the like pass to the trustee in bankruptcy, but even where the right has passed to the trustee, a bankrupt can sue subject to the right of the trustee to claim the proceeds, vide *Cohen v Mitchell*, *supra* also the cases cited in *Umar Bahadur v Khaja Mohammad* *supra* In this country there is a conflict of opinion in the several High Courts, vide *supra*

Under the English law, if a mortgage is in the form of an assignment of the after acquired property and the mortgagee acquires the property before bankruptcy then the mortgagee's title is good as against the Receiver, *Tailby v Official Receiver*, (1888) 13 AC 523 But if the property does not fall into the possession of the bankrupt until after bankruptcy then the mortgagee has no right to the property For instance, a debt which is to fall due at a future date is assigned and the debt only falls due after bankruptcy, the assignee gets no right to it as against the trustee, *Ex parte Hall*, (1870) 10 Ch D 613 But if the debt falls due at the date of assignment, the assignee will not lose priority over the trustee if it is realised after bankruptcy *Ex parte Moss*, (1884) 14 QBD 310

Adverse possession by Bankrupt as against Receiver: After acquisition of property by the insolvent is for the benefit of the Receiver, therefore the bankrupt's possession is not adverse to the Receiver, Comp *Official Assignee v Moorti Dass*, 22 IC 271 [on appeal, 29 IC 168, (Mad)], also *Murali Dass v Official Assignee*, 43 IC 532 (Mad) For contra see *Kristo Comul v Suresh Chunder*, 8 Cal 556 followed in *Suja Hossein v Monohur Das*, 24 Cal 244

Sub sec. (5) • Non-attachable properties This subsection simply says that the word *property* in this section does not include the non attachable properties (of course, excepting the account books) See *Lal Bahadur v Paspal Prasad*, 10 O LJ 31 AIR 1923 Oudh, 154 74 IC 801 Compare this section with sec 21 (2) Therefore, all the properties which are exempt by reason of sec 60, C P Code, or by any other law, from liability to attachment and sale in execution of a decree do not vest in the Official Receiver, *Muthu enkala Rama Reddiar v Official Receiver, South Arcot* 49 Mad, 227 50 MLJ 90 AIR 1926 Mad 350 92 IC 398 Thus the property of a member of an agricultural tribe, by reason of sec 16 of the Bundelkhand Land Alienation Act (Act II of 1903) is not liable to attachment and therefore does not vest in the Receiver, *Hanuman Prasad v Harakh Narain*, 42 All,

142 18 A L J 59 58 I C 551, *Net Singh v Estate, Gajraj Singh*, 47 All 952 23 A L J 648 A I R 1925 All 467 89 I C 488 But see, *Manji v Girdhari Lal*, 2 Lah 78 61 I C 664, *Datar Kaur v Ram Rattan*, 2 L L J 333 1 Lah 192 58 I C 603 (F B) Similarly, the non attachable properties being excluded from the category of property, an occupancy holding which is not liable to attachment or sale under sec 20 (2) of the Agra Tenancy Act (II of 1901) does not vest in the Receiver, and cannot be dealt with by the Insolvency Court, *Kalka Das v Gajju Singh*, 43 All, 510 19 A L J 439 62 I C 897, F B, *Sagar Mal v Girraj Singh*, 39 All, 120 14 A L J 1031 38 I C 171 See also *Hanuman Prosad v Harakh Narain* 42 All, 142 18 A L J 59 58 I C 581, *Sitaram v Shik Sardar*, 13 N L R 215 42 I C 710 Likewise, the house of an agriculturist does not vest in the Receiver (*Ibid*), Cf *Tulsi Lal v Girsam*, 38 I C 410 An occupancy right which is not transferable by reason of sec 73 of the Bombay Land Revenue Code, does not, likewise vest in the Receiver, *Dharamdas Thawer Das v Sorabji* 121 I C 876 A zemindar is not an agriculturist, therefore the house of a zemindar insolvent is not non attachable under section 60 of the C P Code and is not therefore within the protection of this subsection, *Tej Singh v Banwari*, 40 I C 544 A large landed proprietor even though his sole income is from land is not an agriculturist within the meaning of s 60, cl (c) of C P Code, *Muthuvenkataram Reddiar v Official Receiver, South Arcot* 49 Mad 227 50 M L J 90 A I R 1926 Mad 350 92 I C 398 Under s 16 of the Punjab Land Alienation Act, the property of an insolvent agriculturist is not liable to sale, but nothing is said about its being not liable to attachment and, therefore, his property does vest in the Receiver and the Receiver would be entitled to sell the property to an agriculturist, *Jaimal v Chanan Mal*, A I R 1928 Lah 734 The protection given by that clause is given to small owners of land as well as actual tillers of the soil, *Ibid* The word "agriculturist" must be interpreted in a strict sense, *Ibid* It is only the house and cattle shed used for the purpose of agriculture that are exempted under this section, read with sec 60 of C P Code, *Ibid* As under sec 60 of the C P Code, only one half of the salary of the insolvent is liable to be seized, the other half may be protected under this clause, Cf *Ram chandra v Shyama Charan*, 18 C W N 1052, *Debi Prosad v Lewis*, 40 All, 213 16 A L J 107 43 I C 984 According to some opinion, the words "attachment and sale" in this subsection must be read together and not separately, and some distinction should be made between this expression and the expression "attachment or sale," *Manji v Girdhari Lal*, *supra* So, unless there be prohibition both against attachment and

sale, the case will not fall within this sub-section, *Ibid* The Allahabad High Court has (and we think rightly) refused to interpret the word 'and' in a cumulative sense, see *Vel Singh v Estate, Gajraj Singh*, 47 All, 952, *supra* The expression "exempted from" governs the word "liability" and not the two words, "attachment" and "sale", *Ibid* This sub-section should not be so construed as to mean that it is not the whole property but only the property which is liable to attach and sale under sec 60, C P Code, which vests in the Receiver, *Seth Vishindas v Thawerdas*, AIR 1925 Sind 18 80 IC 642 It may incidentally be mentioned here that money deposited in Court by the insolvent by way of security for the costs of a Privy Council appeal may be attached subject to the result of the appeal, *Jagdish Narain v Ram Sakal* 8 Pat 478 9 Pat LT 969 AIR 1929 Pat 97 114 IC 465 The attachment referred to here means an attachment for the purpose of sale, *Sitaram v Shaikh Sardar*, 13 NLR 215 (*supra*)

In view of the Special Bench decision of the Calcutta High Court in *Chandra Benode v Alla Bux*, 48 Cal, 184 31 CLJ 510 24 CWN 818, an occupancy holding in Bengal did not come within the protection of this section, see *Entazuddi v Ram Krishna*, 24 CWN 1072 Cf *Arman Sardar v Salkhna Ji Stock Co*, 18 CLJ 564 and the notes at p 16, *ante* Now under sec 26 B of the Bengal Tenancy Act, an occupancy holding is transferable and therefore will vest in the receiver A suit for claiming exemption of certain property from attachment by an insolvent is maintainable inasmuch as a non attachable property does not vest in the receiver, *Balaji Sao v Anand Prasad*, 23 NLR 66 AIR 1927 Nag 217 103 IC 131

Provident Fund Under Sec 3 of the Provident Funds Act (Act XIX of 1925) a Government or Railway Provident Fund is not liable to attachment and does not vest in the Receiver under this section, *Hindley v Joynarain*, 24 CWN 288, *Nagindas v Ghelabhai*, 44 Bom, 673 22 Bom LR 322 56 IC 450 *Vide supra* Compulsory deposit made under the Provident Funds Act after it has been actually paid to an insolvent can be attached It retains its characteristics as compulsory deposit only so long as it is in the Fund, *Gaur Shanker v De Cruze*, 29 O C 278 3 O WN 378 1 Luck 318 14 O LJ 425 AIR 1927 Oudh, 22 92 IC 673 A deposit in Provident Fund so long as the subscriber is in service [or on his death or his retirement] is not attachable by a creditor the moment the subscriber retires, *Devi Prasad v Secretary of State*, 21 ALJ 454, subsequent accretions such as contributions, interest or increment to the original deposits are not attachable, *Secretary of State v Rajkumari Mookerji* 50 Cal, 347 As to the nature of compulsory

deposits in Provident funds, generally see *Juggannath v Taraprasanna*, 3 Pat 74. The disposal of the Provident Fund by the insolvent is not fraudulent and therefore not punishable under sec 60, 44 Bom, 673 (*supra*). For political pensions *vide* at p 175, *ante*.

For the purposes of this Section The *exempted* properties are not properties for the purposes of this section, though they may rank as properties for the purposes of the other sections. For instance, the word "property" in sec 66 (2) will include even the exempted properties, *vide* also the notes under that sub-section. Cf *Seth Vishandas v Thackerdas*, AIR 1925 Sind, 18. So IC 642.

Sub-sec. (6): Secured Creditor Compare this clause with sec 7 (2) of the Eng Bankruptcy Act, 1914, as amended in 1926. The position of a secured creditor is not in any way affected by the section (*i.e.* sec 28), see *Sant Prasad v Shree Dutt*, 2 Pat 724 AIR 1924 Pat 259 77 IC 589, *Motiram v Rodwell* 21 ALJ 32 LR 3 A 638 AIR 1923 All, 159 79 IC 749, so that he has all his natural remedies open to him, *vide* sec 47, *infra*. This sub-section embodies the principle that the property of a secured creditor is secured to the extent of the value of his security and is no longer the debtor's property but his own and has, consequently, the right to deal with it as he thinks best, *Bai Kashi v Chuntal*, 31 Bom LR 1199. He holds quite a different position from that of an unsecured creditor, *Shridhar v Almaram*, 7 Bom, 455. It is open and legal for him to realise his security in any way he likes, *Shiwasarup v Nand Ram*, 43 All 555 19 ALJ 511 63 IC 366, *Official Receiver Coimbatore v Palani Sوامi Chetty*, 48 Mad, 570 (1925) MWN 672 42 MLJ 203 AIR 1925 Mad 1050 88 IC 934. So a mortgagee can execute his mortgage decree even after adjudication, *Mir Haji Nur v Mahomed Khan*, 7 SLR 184 24 IC 830, *Ex parte Hirst*, (1879) 11 Ch D 278, and the Court has no jurisdiction to restrain him from selling the insolvent's property in execution of his decree, *Re Evelyn*, (1894) 2 QB 302, *Ponsford v Union Bank*, (1906) 2 Ch 244. Cf *Re Whise, Ex parte Chouksey*, 6 SLR 97 17 IC 31, a mortgagee of land who gains possession even after bankruptcy is entitled as against the trustee to the crop growing on the land as well as the land itself, *Re Gordon*, (1889) 6 Morr 115. It is not necessary for a secured creditor who has obtained a decree to prove his debt in insolvency proceedings, *Bapuji v Tansa* 120 IC 218 (Nag). Where the secured creditor is a mortgagee, it is only the "equity of redemption" that vests in the Receiver upon the mortgagor's bankruptcy. *Shridhar-narayan v Almaram Gobind*, 7 Bom 455, *Shridhar v Krishnaji*, 12 Bom 272, *Rain v Bank of Bengal* 5 CWN

16, *Govinda v Abdul Kadir*, AIR 1923 Nag 150
Purushottam Naidu v Ramaswami, 20 L W 667 AIR 1925
 Mad 245, *Chettiar Firm v Hla Bu*, 5 Rang 623 AIR
 1928 Rang 23 106 IC 200, and notwithstanding such vest-
 ing the mortgagee is entitled to proceed with his mortgage
 suit, *Muniruddin v Mahomed Baksh*, 63 IC 91 (All)
Kannappa Mudaliar v Raju Chettiar, 47 Mad 605 34 MLJ
 241 20 L W 45 47 MLT 16 AIR 1924 Mad 761
 (1924) MWN 520 79 IC 850 He can enforce his security
 as if this section had not at all been enacted, *Jagannath
 Maruani v Kalachand* 41 CLJ 290 29 CWN 771
 AIR 1925 Cal 785 86 IC 1042 This however does not
 imply that the mortgagee can proceed with his mortgage suit
 against the insolvent without impleading the Receiver to
 whom the bankrupt's rights have been assigned by operation
 of law *Kalachand Banerji v Jagannath Maruani*, 54 IA 190
 54 Cal 595 45 CLJ 544 31 CWN 741 52 MLJ 734
 25 ALJ 621 AIR 1927 PC 108 101 IC 442 (PC),
 that is the secured creditor is not entitled to deal with the
 security as if there had been no vesting in the Court or the
 receiver vide under the next heading This sub section is not
 to be read as subject to the provisions of sec 53 Therefore,
 an application by the Receiver under that section to annul a
 mortgage will not debar the mortgagee from proceeding with
 his mortgage suit *Official Receiver, Coimbatore v Palaniswami
 Chetty supra* A Receiver in insolvency is not affected by the
 doctrine of *lis pendens* and a party seeking to bind him by the
 result of the suit must apply to have him joined as a party to
 the suit *Mokshagunam Subramania v Ramakrishna*, 42 M I J
 426 16 L W 48 AIR 1922 Mad 335 70 IC 357 Cf
Punithazelu v Bhashyam Aiyangar 25 Mad, 406, *Ghulam
 Mahomed v Panna Ram* AIR 1924 Lah 374 72 IC 413
 The Receiver is bound as a condition of dealing with the
 mortgaged property in every case to pay off the mortgage,
 even when the mortgagee has not sought to be placed in the
 schedule *Sridhar Narain v Atmaram* 7 Bom, 455 The
 mortgagee is entitled to be paid in full either by the Receiver
 or out of the sale proceeds of the mortgage property his whole
 principal money together with interest up to date of payment
 and all his costs *Jugal Kishore v Bankim Chandra*, 41 All
 481 When a Receiver realises the assets of the insolvent the
 debt due to a secured creditor constitutes a first charge on the
 amount realised, *Motiram v Roduell, supra*, *Sant Prosad v
 Sheodutt Singh supra* A creditor holding a decree for sale
 upon a mortgage against an insolvent judgment debtor will not
 by reason of his debt not having been scheduled in the
 insolvency proceedings, lose his right to execute his decree
Sheoraj Singh v Gauri Sahai 21 All, 227 An attaching

creditor cannot rank as a secured creditor. So, where a creditor first attaches the insolvent's property, and the same is mortgaged during the continuance of the attachment, it was held that upon insolvency of the debtor, the attaching creditor loses his priority and ranks as an ordinary creditor, whereas the mortgagee has the privilege of a secured creditor, *Gopinath v Gur prosad*, 15 I C 860 (Oudh). This sub section has not the effect of binding the Receiver by the personal undertaking of the insolvent, *Messrs David Sassoon v National Bank*, 7 S L R 61 21 I C 520. A person who is entitled to be subrogated to the position of a secured creditor has a paramount right and is not within the mischief of the section, *Shyam Sarup v Nand Ram*, 43 All. 555 (*supra*). Therefore, where a mortgagee whose mortgage is executed after insolvency satisfies a pre-insolvency mortgage, he will be protected *Ratanlal v Gorinda*, A I R 1926 Nag 29 90 I C 349. The sub section protects the secured creditor in respect of his security but not the insolvent in respect of his voluntary transfer, *Shiogopal v Shukru*, A I R 1925 Nag 418 87 I C 957.

Receiver a necessary party in the mortgage suit :

If a party seeks to bind the Receiver by the result of his mortgage suit he will do well to join the Receiver as a party defendant, *Mokshagunam v Rama Krishna* *supra* otherwise, it will be open to the Receiver either to challenge the mortgage *in toto* (Cf 48 Mad, 750, *supra*) or to exercise his right of redemption. A contrary view was however taken in *Jagannath Marwari v Kalachand Banerji* 41 C L J 290 29 C W N 771 86 I C 1042, and the reason assigned for this view was that in considering the mortgagee's power to deal with his security one should altogether ignore this section as if it were not passed. No doubt, thus far was absolutely correct under sub sec (6). But one wonders why the provisions of sec 90 of the Transfer of Property Act and O XXXIV, r 1 and O XXII r 10 of the C P Code should altogether be ignored in a matter like this. *Jagannath Marwari's* case has however subsequently been reversed on appeal by the Judicial Committee in *Kalachand Banerji v Jagannath Marwari*, 45 C L J 544 31 C W N 741 52 M L J 734 101 I C 442 (P C) in which it has been held that a mortgage suit without impleading the Receiver is entirely ineffective to bind the equity of redemption vested in the Receiver. As to what will happen where no Receiver is appointed, *vide* under sec 4.

Sub-Sec. 7 : The Doctrine of Relation back Under this sub section an order of adjudication will relate back to and take effect from the date of the presentation of the petition on which it is made see *Rakhal Chandra Purkait v Sudhindra Nath Bose*, 46 Cal 991 24 C W N 172, *Janaki Ram v Official Receiver*, 78 I C 16 Cf *Re Bumpus* (1908) W N

90, *Tulsi Ram v Mahomed Araf*, AIR 1928 Lah 738 109 IC 373 Consequently, the vesting of the insolvent's property in the Receiver though literally taking place after the adjudication, is also by a fiction of law shifted back to the time of the presentation of the insolvency petition, so much so, that after filing an insolvency petition the insolvent loses his power of alienation over his property, *Sheonath v Munshiram*, 42 All, 433 18 ALJ 449 55 IC 941 Cf *Bhagwant v Munim Khan*, 6 NLR 146 8 IC 1115, *Sankar Narajana v Alagiri*, 35 MLJ 296 (1918) MWN 487 24 MLT 149 49 IC 283, *Ponsford Baker & Co v Union of London & Smith's Bank Ltd*, (1906) 2 Ch 444 Vide also the notes under the heading "within two years" under sec 53, *post* also the notes and cases under sec 51 under the caption "Change of law" "Presentation" in the sub section means presentation to the right Court, and not to the wrong Court, Cf *Mohamed Marakkhar v Official Receiver, Tinnevely*, (1917) MWN 103 5 LW 123 36 IC 828, and, therefore, an adjudication dates back only to the date of presentation to the proper Court, *Muruga Konar & Co v Official Receiver*, [1930] MWN 470 The fiction of relation back has no place outside the Insolvency Act, *Kaliaperumal Naicker v Ram Chandra* (1927) MWN 245 53 MLJ 142 26 LW 171 AIR 1927 Mad, 693 102 IC 444 Cf *Elliot v Turquand*, (1881) 7 AC 79, *Din Dayal v Guru Saran*, 42 All, 336 18 ALJ 287 59 IC 67 With respect to the doctrine of "relation back" see the following English cases, *Re Foster*, 72 LT 361, *Re Mander Ex parte Official Receiver*, 86 LT 234, *Re Sinclair*, 15 QBD 616, *Re Spackman*, (1890) 24 QBD 738, *Re Simonson*, (1894) 1 QB 433, *Re Drucker*, (1902) 2 KB 237, under the English law, the assets of a bankrupt vest in the trustee from the date of the acts of

English Law

bankruptcy, therefore, after that date such assets cannot be validly assigned

to the prejudice of the trustee, *Re Gunsbourg*, (1920) LR 2 KB 426, following *Brinsmead v Harrison*, (1871) LR 6 Ch Prac 584 Cf *Re Bumpus* (1908) 2 KB 330

29. [New] Any Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication

has been made against him under this Act, either stay the proceeding or allow it to continue on such terms as such Court may impose

Scope of the Section This section is new and corresponds to sec 9 of the Bankruptcy Act, 1914 It is ancillary

to sec 28 [*Sarat Ch Pal v Barlow & Co*, 56 Cal 712 (710), 33 CWN 15 48 CLJ 208 AIR 1928 Cal 782 113 IC 860 (FB)] and empowers a Court to stay, or to restrict the carriage of, a suit or proceeding *pending before it* against the insolvent on proof that an adjudication order has been made against him Cf *Official Receiver Coimbatore v Palani Sوام Chetti*, 48 Mad, 750 49 MLJ 203 (1925) MWN 672 AIR 1925 Mad 1051 88 IC 934 Under the English law as well not only an action or execution can be stayed by the Court on being apprised of the bankruptcy of a man, even an order of commitment against the bankrupt can be quashed, see *Re Nuthall*, (1891) WN 55 Under this section the Court has only two alternative courses to select from and can only stay the proceedings or allow them to continue on terms Its jurisdiction is not taken away by the bankruptcy, *Maroti Rao v Goind* AIR 1929 Nag 356 It will be noticed that in sec 28 (2) a provision has been made prohibiting the institution of a suit or other legal proceeding against the debtor without the leave of the Court after an order of adjudication has been made, that section does not contain any provision as to the proceedings which have already been instituted and which are still pending This new section makes provision for such *pending proceedings* Cf *Ashgan Begum v Muhammad Yusoof*, 61 IC 534 "There is no provision in the Act for the dismissal or stay of suits which are pending against a debtor when an order of adjudication is made against him We have therefore proposed the addition of a new section on the line of sec 18 (3) of the Presidency-towns Insolvency Act, 1909"—Select Committee Report, dated the 24th September, 1919 It seems that the proper remedy of a person who institutes a suit without first obtaining the leave of the Insolvency Court under sec 28 (2) is to apply under this section to the Court, in which he has instituted his suit, for leave to continue the suit against the insolvent, see *Cuddappa Ghouse Khan's case*, cited at p 158, *ante* Vide notes under the next heading

Where a defendant to a suit for recovery of a debt is adjudicated an insolvent, the proper course is to stay the suit and leave the creditor plaintiff to prove his debt in the insolvency proceeding, *Mamraj v Brijlal* 34 All 106 (108) For the contrary view *vide* under the heading 'Suit etc' *infra* The purpose of the stay contemplated in this section is to enable the party to lay his claim before the Insolvency Court if he thinks fit This is however only optional with him as he may in the alternative ask the Court to allow him to continue the suit, *Umar Sharif v Jualaprasad* 21 NLR 9 AI 1924 Nag 300 -9 IC 662 Along with this read the *Civil Justice Committee Report* (1924 25), pp 235 36, para

When a party has been adjudicated an insolvent the Court will be well advised in directing the other party to the suit to bring on record the Official Receiver as a party, and if the Official Receiver is unwilling to become a party then the Court will proceed with the suit on such terms as it may impose upon the party to proceed with the suit, *Gorindasaamy v Rama eerapandiyam*, AIR 1926 Mad 1145 (1926) MWN 739 97 IC 765 *Kalia Perumal Naicker v Ramchandra* 53 MLJ 142 For the staying of execution proceedings against a person adjudicated under the Act of 1907, see *Solayappa v Shunmuga Sundaram*, 50 MLJ 237 (1926) MWN 281 AIR 1926 Mad 510 93 IC 3, which says that the right to have the execution proceedings stayed unless the Insolvency Court gives leave to prosecute them is a substantive right and has not been abrogated by the new Act of 1920 In cases where the attached property is not liable to speedy decay or to any depreciation in value through delay, the Court should do well to stay the execution proceeding pending the disposal of the insolvency case by adjudication or dismissal, *Lyon Lord & Co v Firm of Virbhandas* AIR 1926 Sind 199 19 SLR 35 95 IC 705 The executing Court should do well to adjourn the sale and direct delivery of the property to the receiver in accordance with the provisions of sec 52, inasmuch as the executing Court is not at liberty to complete the sale and make over the sale proceeds to the receiver, *Mahasulhi v Valibhai* 30 Bom LR 455 AIR 1928 Bom 177 (1) 109 IC 152 After adjudication the sale of an insolvent's estate in execution of the decree of a Civil Court without notice to the Receiver confers no right in the property upon the auction purchaser and will be set aside by the Insolvency Court on an application of the Receiver, *Kochu Mahomed v Sankaralinga* 44 Mad 574 14 LW 505 40 MLJ 219 (1911) MWN 236 62 IC 495

This Section compared with section 28 Section 28 does not contemplate the grant of permission by the Insolvency Court to *continue* a civil suit filed without permission Question of continuance arises under sec 29 This latter

Proceedings in ignorance of Adjudication section applies not only to a suit filed before adjudication but (according to some view) also to one filed after adjudication but in real ignorance of it

see *Imar Sharif v Juala Prasad* AIR 1924 Nag 109 21 N I R 9 79 IC 662 Cf also *Des Raj v Duni Chand* 60 IC 588 Under section 28 permission should be obtained from the Insolvency Court, but that is not so under this section *Hid In Cuddapa Ghouse Khan v Bala Subla Rowther* 51 Mad 81 51 MLJ 412 (1928) MWN 122 26 LW 118 AIR 1927 Mad 925 105 IC 109 it has likewise been

observed that "the proper remedy of a person who has instituted a suit against the insolvent without obtaining the leave of the Insolvency Court is to apply under sec 29 of the P I Act to the Court in which he has instituted the suit for leave to continue the suit against the insolvent " But it is difficult to appreciate why the latter Court should allow a contravention of the law or permit a party to resort to a tricky device to defeat a clear provision of the statute So it seems to have been rightly held in *Firm Panna Lal v Firm Heranand*, 8 Lah 593 28 P L R 634 A I R 1928 28 102 I C 37 that a suit instituted without the necessary previous leave should be dismissed (even if instituted in ignorance of the adjudication order) and the provisions of this section (i e sec 29) would be inapplicable to such a case)

The Section applies only after adjudication The language of the section makes it abundantly clear that no question of stay etc can arise until an order of adjudication is made, see *Subramania Aiyar v Official Receiver Tanjore*, 50 M L J 665 23 L W 300 A I R 1926 Mad 432 93 I C 877 So it has been held that the mere presentation of an insolvency petition, so long as there is no order of adjudication, will not prevent the execution of a decree *Ram Bharosey v Sohan Lal*, L R 5 A 408 A I R 1924 All 707 82 I C 1 But compare *Mahomed Haji Isakh v Abdul Rahiman* 41 Bom 312 18 Bom L R 198 33 I C 694 , *Browns Combe v Fair*, (1887) 58 L T 85 , *Vide* 95 I C 705, *supra*

Non-observance of provisions hereof If the Court though apprised of the insolvency does not stay the suit but proceeds to judgment, the same, if not otherwise bad, will not be vitiated and need not be set aside, *Govindasami v Rana-veetapandian* (1926) M W N 739 24 L W 387 A I R 1926 Mad 1145 97 I C 765 It seems that if the Court does not exercise the option given by this section, the Official Receiver will not be bound by the result of its decision made behind his back Cf *Ibid*

Suit Etc The section does not indicate what class of suits or proceedings can be so stayed or restricted It seems that suits or proceedings in which the relationship of debtor and creditor is not involved cannot be stayed e g a suit for restitution of conjugal rights or a suit for injunction or bare declaration Actions or proceedings in respect of a debt or liability which is not provable in bankruptcy are unaffected by this section , thus an obligation to make payment of alimony may be declared and enforced notwithstanding a receiving order, Cf *Linton v Linton*, (1885) 15 Q B D 239 *Re Hawkins*, *Ex parte Hawkins*, (1894) 1 Q B 25 *Kerr v Kerr*, (1897) 2

Q B 439 Where subsequent to the institution of a suit for maintenance, the defendant was adjudicated an insolvent, the Court would have power to decree maintenance and to charge it, on the defendant's properties in the hands of the Receiver as from the date of the institution of the suit, *Official Receiver v Subramma*, A I R 1927 Mad 403 99 I C 564 Similarly, proceedings of a punitive character cannot be stayed *Re Edgcome, Ex parte Edgcome*, (1902) 2 K B 403 The Court can stay only a suit against the debtor and not by the debtor. The section contemplates suits filed both before and after adjudication, *Umar Sharif v Juala Prosad*, A I R 1924 Nag 300 21 N L R 9 79 I C 662 It is for the Court in which a suit against an insolvent is pending to grant permission for its continuance even when the suit was instituted after the passing of the order of adjudication, but in ignorance of it. *Ibid* When one of two defendants is adjudged a bankrupt pending a suit the plaintiff may continue the said suit as against the other defendant, *Mumraj v Brijlal*, 34 All 106 As regards the insolvent-defendant, the Allahabad High Court is of opinion that the plaintiff cannot proceed against him but prove his claim in the bankruptcy proceeding, *ibid*—relying on (1881) 7 Q B D 413 The Sind Court, on the other hand, maintains that the plaintiff can proceed against the insolvent and get a decree and then prove the decretal claim in the insolvency proceeding, see *Jethalal v Gangaram*, 8 S L R 325 29 I C 30 "Other proceeding" referred to in the section is a proceeding in the nature of a suit or a proceeding in a suit itself, *Sarat Ch v Barlow & Co* 56 Cal 712 33 C W N 15 48 C L J 298 A I R 1928 Cal 782 113 860, (F B), that is, it is *ejusdem generis* with a suit, *Re Maneckchand Virchand*, 4 Bom 275 commented on in 49 Bom 788

Proceedings not within the purview of the Section
 Proceedings not with the object of saddling the insolvent, with pecuniary liability are not within the purview of this section.

Thus proceedings of a preventive character will not be restrained under this section. Imprisonment for non payment of rates is a punitive measure and cannot be helped by reason of bankruptcy, *Re Edgcombe* (1902) 2 K B 403 Cf *Ghansamdas v Manager*, 1927 Sind 123, cited at p 111 But an adjudicated husband ordered to pay maintenance will not be guilty of wilful neglect within the meaning of sec 488 (3) of Cr P Code *Halfhide v Halfhide* 50 Cal 86. Actions or proceedings in respect of a debt or liability which is not provable in bankruptcy does not fall within the purview of this section. Thus obligation to pay alimony may be enforced notwithstanding bankruptcy, *Linton v Linton*, (1885) 15 Q B D 209 Cf 50 Cal, 867 and other

cases cited at p. 12. ante and under the heading "Suits etc supra

On proof The fact of adjudication can be proved by means of a certified copy of the order of adjudication or by an affidavit in that behalf of C P Code or by the sworn statement of a person. This section does not say by whom the proof is to be given so the Court can act on evidence coming from any quarter.

Adjudication against him The word against may be liable to this comment that it refers only to the case where the adjudication order is made against the debtor at the instance of the creditor and that it does not cover the case of an adjudication order made at his instance. The Legislature it seems meant to cover both the cases though its language is somewhat faulty.

Stay Note that the adjudication by itself does not operate as a stay of proceedings though the Court, in cases in which it does not all in the continuance of proceedings shall stay proceedings on receiving proof of adjudication. The power to stay a pending proceeding under this section belongs to the Court which has got seisin of the matter. This section will not empower an insolvency Court to stay proceedings in other Courts by issuing injunctions or otherwise. See *Imph Kumar v. Kesho Das* (1911) 45. In this respect the Indian law is different from the English law under which a County Insolvency Court has power to stay proceedings in another Court (excepting the High Court perhaps). Cf. Sec. 111 of the Bankruptcy Act 1914. The Insolvency Court has no jurisdiction to issue an injunction upon a person not a party before it. *Ramsundar v. Pam Dhan*, 3 P L J 456 (1918) Pat (CW N) 303 5 P L W 215 46 IC 221. A maintenance suit can be allowed to be continued against a defendant who is adjudicated an insolvent pending the suit after impleading the Receiver as a party defendant, *Official Receiver v. Kalawa Sublamma* AIR 1927 Mad 101 90 IC 561, and the Court has power to decree maintenance charging the insolvent's properties in the Receiver's hands. *Ibid*. The Court is not bound to stay proceedings under this section until an adjudication order has been made. *Subramania Aiyar v. Official Receiver Tanjore*, 30 M L J 665 23 L W 300 AIR 1926 Mad 432 91 IC 877. It is only after such adjudication that the question of stay can arise. *Ibid*. A mere notice of the admission of the insolvency petition to the executing Court does not prevent it from selling the judgment debtor's property in execution of a decree. *Ralla Ram v. Ram Iabhaia* 6 L I J 232 AIR 1925 Pat 158 60 IC 509. The presumption from the word "stay" is that the suit stayed is

not at an end, but may be continued, *Motumal v Ghansamdass* A I R 1929 Sind 204, staying of a suit is not equivalent to dismissal of it, *ibid*. A Judge sitting in insolvency in the High Court can under sec 18A of the Presidency Town Insolvency Act stay proceedings pending in respect of the same debtor in a district Court under this Act. The contrary view taken in *Sarat Ch Pal v Barlow & Co*, 56 Cal 712 33 C W N 15 48 C L J 298 A I R 1928 Cal 782 (F B), *Re Naginbhai Maganlal Jaichand* 40 Bom 788 (794, 795), is no longer good law.

Terms This section gives an option to the Court to impose such terms as it thinks fit to do while permitting the continuance of a suit, *Gorindasami Pillai v Rama Iyer Chandayan* (1926) M W N 739 A I R 1926 Mad 1145 9 I C 765

Petitioning creditor cannot withdraw money deposited If money is deposited in Court by the debtor during the pendency of insolvency proceedings against him, it ought to be kept in Court and the petitioning creditor should not be allowed to withdraw it during continuance of insolvency proceedings *Ko Maung Gyi v Chettiar Firm*, A I R 1929 Rang 338

30. [§ 16 (7)] Notice of an order of adjudication stating the name, address and description of the insolvent, the date of the adjudication *the period within which the debtor shall apply for his discharge*, and the Court by which the adjudication is made, shall be published in the local official Gazette and in such other manner as may be prescribed

This is the old section 16 (7), it provides for the publication of the adjudication order in the local official Gazette. It also requires that the order should also be published in such suitable manner as may be prescribed, within the meaning of sec 2 (1) (c) and sec 79. In this connection see Rule 6 of the Calcutta and Allahabad High Courts and Rules 21 and 24 (1) of the Madras and Bombay High Courts.

The Notice The notice to be published shall contain the following particulars (1) Name, address and description of the insolvent, (2) the date of the adjudication, (3) the period within which the insolvent is required to apply for his discharge (4) the name of the Court making the order of adjudication.

Published etc. Note the difference in the procedures recommended for the purpose of publishing the notice of admission of the insolvency petition and that of the adjudication.

order [section 19 and 20] Under the old Act both the notices had to be published in the local official Gazette [*ide* old sections 1 and 16 ()] But under the present sec 19 notice of admission of petition need not be published in the Gazette

Non publication of the adjudication order in the Gazette is a mere irregularity which does not vitiate the adjudication or render it null and void *Gillmore v Bilal Lal* 19 P P 1000 (F B) Cf *Parikamal v*

Pank of Bengal 5 C W N 91 Therefore an adjudication order cannot be annulled for failure to deposit the costs of publication under this section *Har Kishore v Masun Ali* AIR 1030 Oudh 55 Where the requisite costs are not put in the same may be recovered from the insolvent estate *Ibid*

The Gazetting of an adjudication order does not prevent its reversal on appeal Cf *Ex parte Lindsay* (18 4) 19 Eq 52

Ex parte Geisel 2 Ch D 436 The publication in the Gazette of an adjudication order is conclusive against all the world as to the validity of the order *Ex parte French* 52 L J Ch 48 So where a copy of the Gazette containing the publication notice is produced that will be conclusive evidence of the due making of the adjudication order its date and its legality *Hawkins v Duche* 3 T L R 748

Publ cat on in Gazette is conclusive evidence of the legality etc of the order of adjudication

Proceedings consequent on order of adjudication

31. [New] (1) Any insolvent in respect of whom an order of adjudication has been made may apply to the Court for protection and the Court may on such application make an order for the protection of the insolvent from arrest or detention

(2) A protection order may apply either to all the debts of the debtor or to any of them as the Court may think proper and may commence and take effect at and for such time as the Court may direct and may be revoked or renewed as the Court may think fit

(3) A protection order shall protect the insolvent from being arrested or detained in prison for any debt to which such order applies and any insolvent arrested or detained contrary to the

terms of such an order shall be entitled to his release

Provided that no such order shall operate to prejudice the rights of any creditor in the event of such order being revoked or the adjudication annulled

(4) Any creditor shall be entitled to appear and oppose the grant of a protection order

This section is new. It contemplates protection *after* adjudication just as sec 23 contemplates protection *before* adjudication

The Court may, on the application of the insolvent, make a protection order in his favour *after* adjudication. Cf 4th M L J 530 *infra*. It is but proper that a person who purchases his personal freedom by surrendering all his properties in the world should have his such freedom well protected. Compare the observations of the learned judges in *Satish Ch Addl v Firm of Rajnarain Pakhira* 72 I C 60 (Cal), also the Civil Justice Committee Report, p 225. Under the repealed Act, an order of adjudication would have *ipso facto* entitled the insolvent to an immediate protection without any application on his part for that purpose. But this Act has abolished that system. The object of this section has been thus explained by Sir George Lowndes: "We propose to abolish the automatic protection which he (the insolvent) gets upon adjudication. It is proposed by this Bill to repeal the provision of the existing Act, which provides that immediately on adjudication, the insolvent should be released from jail and make it necessary for him to apply to the Court for protection leaving to the discretion of the Court to grant him protection in any degree it thinks fit." For instances of automatic protection under the old Act, see *Mullapalli Gopalan v Koppathil Gopalan* (1925) M W N 61^a 22 L W 20^a A I R 1925 Mad 915 (F B). Read in this connection the Civil Justice Committee Report p 231.

The section applies only *after* the order of adjudication is made, *Sinnaswami v Aligi Goundan*, 47 M L J 530 20 L W 870 A I R 1924 Mad 893 (1924) M W N 836 80 I C 93^c

Change introduced The change introduced in respect of the provision relating to the insolvent's protection should be carefully noticed. They are as follows —

(1) Now there is no automatic protection or release, that is, the insolvent cannot have them upon adjudication as a matter of course.

(2) There must be an application by the insolvent for the purpose if he wants to have them.

(3) The nature of the protection order is in the discretion of the Court. It may be a general one or a limited one being restricted to particular debts and for specified periods.

Sub-section (1): An order of adjudication has been made—The application by the insolvent for a protection order can be made *after* he has been adjudicated as such. It seems that under the present Act at any rate an *anticipatory interim* protection order cannot at all be made, though an *interim release* from arrest or imprisonment is permissible under sec 23. See also *Jewraj Kharsuaka v Lalbhai* 30 C W N 834 A I R 1926 Cal 1011 66 I C 131 in which Cuming J (Page J reserving his opinion) holds that the Court has no power to grant *ad interim* protection pending adjudication. His Lordship's language is somewhat indefinite inasmuch as it is only *anticipatory interim* protection that cannot be granted. See the commentaries at p 131, *ante*, and the cases there referred to. After adjudication *general* protection order may be made in favour of an insolvent which may be of an *anticipatory* character and which may exempt the insolvent from all future arrests or imprisonments.

Arrest after adjudication *Vide* notes under the heading "Arrest" at pp 183 84 *ante*. *Vide* also the notes under sec 32, *infra*.

May May It follows from the wordings of the section, that the Court cannot *suo motu* make the protection order, it can do so only on the application of the insolvent. Such an application should be made to the Court which means the Insolvency Court. The making of a protection order is in the *discretion* of the Court, *vide supra*. In granting a protection order the Court should take into consideration the surrounding circumstances and the general conduct of the insolvent. Where the bankruptcy is of a flagrantly culpable kind being the result of gross extravagance accompanied by grave malpractices and a total disregard of common honesty, the Court may not grant any protection, *Hazi Essack v Abdul Rahaman*, 40 Bom 461 31 I C 507 17 Bom L R 989 31 I C 507—distinguishing 35 Bom 47 also see 41 Bom, 312 18 Bom L R 198 33 I C 694. Cf *Malchand v Gopal* 21 C W N 298. The protection order is a privilege to be granted or withheld as the Court, in its discretion may determine and in exercising that discretion it is relevant and proper for the Court to have regard to the character and circumstances of the insolvent. *Roshan v Mohiuddin* 31 Bom L R 206 A I R 1929 Bom 135 118 I C 791. Cf *Re Meghraj Gangabux*, 35 Bom 47 which says that the insolvent should not be subjected to unnecessary pressure and harassment. But a reckless and grossly dishonest insolvent is not entitled to such leniency, see 40 Bom 461, *supra*.

Detention. Note that this word is wider than *imprisonment* and is therefore the more appropriate word, *detention* implies interference with the liberty of movement and imprisonment refers to actual commitment to the prison. So what is not imprisonment may be detention.

Sub-section (2). The Court may extend the protection order to *all* or *any* of the debts of the debtor. The Court should specify to which of the debts the order should apply. In absence of any such direction, the order will apply to *all* the debts. The Court has also the power to limit the duration of the protection order and to point out from which date it is to take effect. The Court can also revoke and renew the protection order. It seems that the protection which this section gives to the insolvent extends only in respect of debts provable under the Act, *Hiralal v. Tulsī Ram*, AIR 1925 Nag 77. So IC 946, vide also the cases at p 132, *ante*, and those under the heading "Proceedings not within the purview of the section" under sec 29, *supra*. The liability in respect of a surety bond executed by an insolvent prior to his adjudication is a debt within the meaning hereof and the insolvent can get a protection order in respect of the same, 57 M L J 44 (N R C). It has been held that the Insolvency Court has no power to make a protection order against Crown debts, *Collector of Akhbar v. Pannu U*, 5 Rang 806 AIR 1928 Rang 81 109 IC 145.

Sub-section (3): This sub-section lays down the effect of the protection order. It says that such an order will exempt the insolvent from arrest or detention in respect of all debts to which the order applies. An insolvent arrested or detained contrary to such an order *shall* be entitled to release. There is a proviso to this sub-section which says that such a protection order will lose its force when it is revoked under the sub-section or when the adjudication is annulled under section 35, 36, 39 or 43. The insolvent cannot be deprived of the immunity conferred upon him by this section without a notice to him to show cause in his defence, *Seshayangar v. Venkatachalam*, 5 L W 220 31 IC 15.

Sub-section (4) A creditor is entitled to appear and oppose the grant of a protection order. This sub-section makes it clear that notice of a debtor's application for protection should be given to his creditors. It is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly affect or prejudice any party cannot be made unless he had been afforded an opportunity to be heard, this is merely an instance of the application of the Maxim, *audi alteram partem*, *Rajendra v. Atal Behari* 25 C L J 456 *Ajant Singh v. Christien Mal* 17 C W N 862, see also *Jagannath v. Mahesh*, 25 C L J 149 (132), see also at pp 108 and 117, *ante*.

Under this sub section, a creditor can only *oppose* the grant of a protection order, so if, on receipt of a proper notice, he does not appear to oppose the grant of the protection order, he cannot, when the order is made, come forward and challenge it

Surety not absolved because of protection order : Where a surety undertakes to produce the insolvent before an executing Court until the insolvent is finally discharged, he is not absolved of his liability because of the grant of a protection order to the insolvent, 97 I C 413 (Mad)

32. [New] At any time after an order of adjudication has been made, the Court may, if it has reason to believe on the application of any creditor or the receiver, that the debtor has absconded or departed from the local limits of its jurisdiction with intent to avoid any obligation which has been, or might be, imposed on him by or under this Act, order a warrant to issue for his arrest, and on his appearing or being brought before it, may, if satisfied that he was absconding or had departed with such intent, order his release on such terms as to security as may be reasonable or necessary, or if such security is not furnished, direct that he shall be detained in the civil prison for a period which may extend to three months

The Section This section is new and empowers the Court to direct the arrest of an insolvent after adjudication, in certain cases. It is referred to in the Select Committee's Report (dated the 24th September 1919) in these words, "We have also provided a new section to arrest a debtor who has absconded after an order of adjudication has been made against him". Under the English law if an insolvent after the presentation of a petition by or against him absconds for the purpose of embarrassing the insolvency proceedings he may be arrested and it will be a felony for him if he after such presentation or within four months before such presentation, leaves or attempts to leave England and takes with him any property worth £20 Cf Secs 25 and 163 (2) of the Bankruptcy Act 1883

At any time etc The expression means 'at any time after adjudication but before discharge'. Any time does not mean after discharge because the object of this section is to enforce the performance of obligations imposed under this Act, but such obligations disappear after discharge see sec 44 bc

The Court may etc. The power conferred upon the Court by this section is discretionary. The Court cannot move in this matter *suo motu*, but an application has to be made to the Court by a creditor or receiver. All applications by way of motion ought to be supported by affidavits. Before the Court can be moved good grounds must be shown for exciting belief in the Court's mind that the facts stated in the creditor's or receiver's application are true.

Absconded or departed etc. It is not sufficient merely to show that the insolvent has absconded or departed from the local limits of the Court's jurisdiction *with intent to avoid any obligation which has been or might be imposed on him by or under this Act* and the Court before making an order under this section must be satisfied of such intent.

Three months. Detention under this section should on no account be for more than three months. As to the main object of an adjudication order is to afford the insolvent personal protection he should not be imprisoned under this section if he offers to furnish security as required by the Court.

33. [§ 24] (1) *When an order of adjudication has been made under this Act*

Schedule of Creditors all persons alleging themselves to be creditors of the insolvent in respect of debts provable under this Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof, and the Court shall by order, determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts and the amount of such debts respectively and shall frame a schedule of such persons and debts.

Provided that if in the opinion of the Court the value of any debt is incapable of being fairly estimated, the Court may make an order to that effect and thereupon the debt shall not be included in the schedule.

(2) A copy of every such schedule shall be posted in the Court house.

(3) Any creditor of the insolvent may, at any time before the discharge of the insolvent tender proof of his debt and apply to the Court for an order directing his name to be entered in the

schedule as a creditor in respect of any debt provable under this Act, and not entered in the schedule, and the Court, after causing notice to be served on the *Receiver** and the other creditors *who have proved their debts*, and hearing their objections (if any) shall comply with or reject the application

Change in the Law The following words have been added to this section, viz when an order of adjudication has been made under this Act. These words clearly show that the proof of debts should be tendered after the adjudication order. In sub-section (3), the words, "who have proved their debts" have been added after the word "creditor" in order to obviate the necessity of sending notices to creditors who have not yet proved their debts and thus to shorten the proceedings, (see the *Notes on Clauses*). For the reason of the change effected in 1926, vide the Footnotes. This new amendment recognises the principle that it is the Receiver and not the insolvent, who has *locus standi* to contest proof of debts. Comp notes, under sec 50 (1), *infra*

Object of the Section. The object underlying the section is the same as that which underlies Rule 1 of Sch II of the Eng Bankruptcy Act, 1883, namely, to enjoin the creditors to tender proof, as early as possible, a course tending to convenience in the administration of the insolvent's estate. This section does not enact a rule of limitation, *Sri Subramania v Teethiappa Pillai*, 47 Mad, 120 45 M L J 166 (1923) M W N 895 18 L W 636 A I R 1924 Mad 163 75 I C 472

All persons This section gives an opportunity to all persons alleging themselves to be creditors of the insolvent to prove their respective debts. But the debts should be such as are *provable* within the meaning of section 34, below. The words "persons alleging themselves etc" mean *persons who claim to be creditors*. The expression does not exclude persons who are alleged to be creditors by the insolvent in his insolvency petition, though such a view appears to have been taken in *Krishna Ch v Jotindra Nath* 48 C L J 574. If that view were correct, it will not at all be necessary for the creditors mentioned

* The word "insolvent" by the Provincial Insolvency Act, 1916. The amendment gives effect to the recommendation of the Justice Committee that notice should be given to the insolvent in as much as he is the proper person to contest proof of debts. See *Statements of Objects and Reasons* for the Bill (No 41 of 1926) published in the *Gazette of India* of 21st October 1926 pt V

in the insolvency petition to prove their debts under this section. All persons include an assignee of the debt due by insolvent. Therefore, a person taking an assignment of the debt from a creditor is entitled to prove the same hereunder, irrespective of whether there was or was not any consideration for the assignment, *Bihari Lal v Abdul Khaliq*, A I R 1930 Lah 235 119 I C 496

A *benamdar* is not a creditor (*vide* p 13, *ante*) and therefore cannot prove hereunder, 37 I C 71 (Cal). An executor or administrator of an estate can prove on behalf of that estate, see Williams p 152, Robson p 236, a foreigner (if not an alien enemy) may tender proof under this section *Halsbury's Laus of England* Vol 2, p 210, Robson p 242

Tender proof For mode of proof see sec 49. A creditor in order to be entitled to participate in the dividend must formally prove the debt, whether or not the debt has been mentioned in the schedule of the bankruptcy petition, Cf 25 I C 708 (Oudh), 12 Bom 342, but an incorrect view seems to have been taken in 48 C L J 574. The framing of schedule at the first instance is mainly an *ex parte* determination of the question as to who are entitled to participate in the dividend, see *Khadir Shaw v Official Receiver*, 41 Mad, 30 (42). Evidence should be given of the amount and other particulars of the debt. These particulars may be necessary for the purpose of determining what are the real debts of the insolvent. Cf *Uday Chand v Ram Kumar*, 12 C L J 400 (406) 15 C W N 213 (217). The mode of proof herein recommended is rather a summary one, and this summary method has been adopted with a view to saving time and money. Where there is a contest in the matter, the Court must decide on each claim on evidence and after hearing necessary parties and should not blindly rely on the Receiver's report though it may, in some cases, render some assistance, *Beharilal v Harsukdas*, 25 C W N 137 61 I C 904. Cf also *Khusali Ram v Bholar Mal* 37 All, 252. Comp also the observation made in *Yokohama Specie Bank v Curlen & Co* 96 I C 459 a case under the Presidency Act. It is the duty of the Insolvency Court under this section to adjudicate as to whether the debt is a good debt or not, *Sheeput Singh v Ram Sarup*, A I R 1926 Cal 982 95 I C 463. Before entering in or removing from the schedule, names of creditors, the Court is bound to come to judicial findings in support of the steps to be taken. *Amir Chand v Anukul Chandra* A I R 1926 Cal 160 95 I C 802. A Receiver cannot go into the question that a certain debt was a harsh and unconscionable bargain and reject proof on that account, it is for the Court to determine the point. *Re Armstrong*, 95 L J Ch 184. An admission by a Mitakshari father as to the genuineness of a debt will not bind his sons who claim by survivorship and not through him, *Ibid*. Where

the mortgagee in a counter petition to an application under sec 53, stated that the mortgage in his favour is a valid transaction, that is not tantamount to tendering proof of his debt, *Muthuswami Chettiar v Official Receiver of North Arcot*, (1926) M W N 035. The bankrupt can cross-examine the creditor on his proof, *Ex parte Justin*, 40 L J B K 14 Ch D 13, cf *Ānāḍī Damodar v James Finlay* 62 IC 441 (Sind), *Sarasunbaramaia v Theethappa*, 47 Mad 120 45 M L J 166.

What amount can be proved A creditor is entitled to prove for the full amount of his debt on the insolvency of the principal debtor notwithstanding that the surety had paid a portion of the debt *Lombay Co Ltd v Official Assignee*, 44 Mad, 381. Payments received from third persons not in private with the bankrupt need not be deducted from the creditor's claim, (1892) 6 Mor 240. Voluntary payments from strangers not in satisfaction of the insolvent's debts cannot likewise be deducted from proof (1904) 2 K B 48. Cf (1877) 2 A C 616, (1905) 1 K B 043 (1944) *Rabbidge v Eagle Star Insurance Co* 08 L J Ch 17. As to the amount of proof in case of set off see 1802 3 Ch 45. As to what amount is to be proved in cases where the insolvent is jointly indebted along with others *vide under* Joint Debts' under sec 4.

Proof in case of unstamped Promissory note Even if a promissory note is unstamped and therefore inadmissible in evidence it is open to the creditor to prove his original debt in the insolvency *Saram Motiram Pillai* AIR 1909 Sind 104 116 IC 111.

Power to go behind Judgment Debt The Court of Bankruptcy has power to go behind a judgment and inquire into the consideration for the judgment debt not only at the instance of the trustee but also at the instance of the judgment debtor as well *Ex parte Lennox* (1855) 10 Q B D 315 54 L T 452 Cf 4 M L J 61 36 304. It is the settled rule of the Court of bankruptcy on which we have always acted that the Court of bankruptcy can inquire into the consideration for a judgment debt per Sir W M James J J in *Ex parte Kibble, In re Onslow* (1875) 10 Ch App Cas 373 *Union Indian Sugar Mills Co v Brit Ind* 49 All 28 AIR 1927 All 426 25 A I J 450 102 IC 756 *Ram Pillai v Kashi Charan* *infra*. The power of going behind judgment debts has been conceded to secure an even distribution of the insolvent's assets among his creditors by superseding collusive decrees and judgments by default *ibid*. The trustee is not bound to accept or admit proof merely because it is supported by sworn testimony. A creditor can always be called upon to prove that he is a real creditor. See (1893) 1 Q B 404, also *Ian Law v Chatterton* (1907) 2 K B 2. The trustee's right and duty, when examining a proof for the purpose

of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt no covenant given by or accounts stated with him can deprive the trustee of his rights. He is entitled to go behind such forms to get at the truth and the estoppel to which the bankrupt may have subjected himself will not prevail against him," per Bigham J in *In re Ian Lunn Ex parte Puttullo* (1907) 1 K B 155 (162 163)—affirmed in (1907) 2 K B 23, Cf 39 All, 95, (1917) 2 K B 60 see also *In re Campbell Ex parte Seal* (1911) 2 K B 997 in which a proof in respect of a loan by an unregistered money lender was rejected though judgment was obtained on the debt and the debtor had promised to pay the same by instalments. Cf (1888) 22 Q B D 83 (1904) 1 K B 577. As to Court's power of going behind a compromise *vide* under s 54 *infra* also *In re*

Receivers' power to go into the nature of debt. The Receiver has only power to submit a report to the Court as to whom he considered to be an approved creditor of the insolvent and he has no power to go into the question as to the nature of the debt at all *Tulsi Ram v Mahomed Araf*, A I R 1928 Lah 38 109 I C 373

Presumption as to consideration for a pro note. A presumption of receipt of full consideration arising from a debtor's signature on a promissory note, can only be available against that debtor personally, and cannot be invoked against the Official Receiver or a creditor *Ram Lal Tandon v Kashicharan* 26 A L J 241 A I R 1928 All 380 108 I C 147

No double proof. There cannot be two dividends in respect of the same debt therefore the same creditor cannot prove his identical debt twice over see *Re Oriental Commercial Bank* (1871) 7 Ch App 99 *Re Melton*, (1918) 1 Ch 57 (48), *Re Moss* (1905) 2 K B 307

No fresh proof if one rejected before. If a creditor tenders proof and the same is rejected on the merits he is not at liberty to tender a fresh proof he must proceed by way of appeal Cf *Re McMurdo* (1902) 2 Ch 684, *Branden v McHenry* (1891) 1 Q B 538

Schedule of Creditors. The schedule should specify the names of the creditors and the amounts of their respective debts. No creditor unless included in such schedule can participate in the distribution of the insolvents' assets *In re Cluni Lal Osval* 29 Cal, 29 Cal 503. The schedule should not include any debt which has not been declared provable under this Act. Even where a debt is provable the Court has power to reject

The duty of framing a schedule is on the Court

an application for entering the name of a creditor in the schedule for sufficient reasons *Izz Hussain v Lachman Das* 6 O & A L R 701. The framing of the Schedule is the duty of the Court and not of the Receiver *Beharilal v Harsuk Das* 25 C W N 176 61 I C 224 Cf 61 I C 76 (Mad). Under sec 83 (b), an Official Receiver has been empowered to frame schedules. In framing a schedule the Official Receiver does not decide judicially or finally upon contested claims *Kladirsha v Official Receiver Tinnevely* 41 Mad 60. Framing of Schedule is at the first instance a summary procedure and any mistakes creeping in may subsequently be rectified *Ibid*.

Schedules in all insolvency matters ought to be settled as soon as possible and before a composition is finally accepted *Telal Mal Litan Chand v Sura Lal* 6 I C 205 (All). *Clandan Lal v Khemraj* 40 I C 150 SC 15 A I J 58. Note that sub-section (1) makes no provision for notice as sub-section (2) does. Where no schedule is prepared the insolvency proceedings would be null and void *P. L. v Puri Chand* 60 I C 555 (Lah). *Harraj v Mal Chand* 24 P R 1007 50 P L R 1098.

Proviso. The proviso says that where the value of any particular debt is incapable of being fairly estimated the debt shall not be included in the schedule. A debt which has been so excluded is not a provable debt within the meaning of sec 4 (1). Once the value of debt has been ascertained and the debt has been entered into the schedule its value can be altered only under sec 50.

A Mahomedan wife is not entitled to be entered in the Schedule of creditors either in her own right or for the amount of her deferred dower debt inasmuch as the same is payable only on death or divorce *Abdullah v Izzat* 1 I C 431.

Effect of the Schedule. Under section 5 of the Code of Civil Procedure 1882 the framing of a schedule was deemed to be a decree in favour of the creditors for the respective sums allotted to them *see Durga Lal v Izzat* 15 Mad 18 Cf *Abdul Jalman v Izzat* 1 All 124. But when this section was re-enacted in sec 4 of the Provincial Insolvency Act of 1900 the words which virtually declared the schedule to be a decree were omitted. So under the repealed Act the exact effect of a schedule became somewhat uncertain. Under the present Act it may be contended (but we think not rightly) that the framing of a schedule is tantamount to a decree 'for the purpose of doing complete justice or making a complete distribution of property' within the meaning of section 4 and therefore is to be deemed a decree for a limited purpose within the meaning of sec 28 (1). The framing of a schedule of

creditors is not however a decree in favour of the creditors to all intents and purposes, therefore, no succession certificate will be necessary for payment of dividend to a scheduled creditor *Omayachi v Ramchandra* 49 Mad, 952 (1926) M W N 560 51 M L J 349 24 L W 279 97 I C 411 The framing of a schedule hereunder does not preclude the Court from entertaining an application under section 50 for expunction of entries *Khadir Shah v Official Receiver*, 41 Mad, 30 The schedule however does not entitle a creditor to the whole amount due to him, because the effect of a debtor's insolvency is to terminate his creditor's right of enforcing his full claim against such debtor and to substitute in the place of that right a new right to share *proportionately* in the distribution of the total amount of available assets of the debtor, *Re Higginson and Dean Ex parte A G*, (1899) 1 Q B 325, (333) When a debt is omitted from the schedule, the creditor loses all his remedies, *Khalil ul Rahman v Ram Sarup*, 8 L L J 286 A I R 1926 Lah 489 93 I C 204, inasmuch as a creditor omitted from the schedule cannot participate in the dividend, 29 Cal 503, *supra*

Non-scheduled debts As a schedule ought not to include the non provable debts, such debts may be recoverable by ordinary suits brought within the ordinary periods of limitation Cf the *proviso* to sec 78 below See also *Menghraj v Virbhandas* A I R 1924 Sind 122 17 S L R 300 76 I C 250, in which it has been held that a creditor who does not prove his debt and is not scheduled hereunder in consequence is not precluded from suing to recover his full amount after the adjudication has been annulled and the insolvent has been discharged on a scheme of composition (of course, if he is not a party thereto)

Sub-sec. (2) A schedule framed under sub-sec (1) shall be posted in the Court house This provision is obligatory

Sub-sec. (3) It says that a creditor can tender proof of his debt *at any time* before the discharge of the insolvent and apply to have his name included in the schedule of creditors But the debt should be one which is provable under sec 34 (which please see) and notice of the application should be first given to the other creditors entered in the schedule and their objections (if any) *should* be first heard Cf *Mirza Ali v Quadri* 21 P L R 1919 50 I C 774 Cf 47 Mad 120 45 M L J 166 75 I C 572 Fictitious, fraudulent and illegal debts have no place in the schedule Cf 56 P R 1919, (1878) 8 Ch D 621 The sub section uses the words "any creditor" (and not "any unscheduled creditor") which are sufficiently wide to include a creditor who has already proved one or more debts but wishes to prove a *further* debt which for some reason or other he has omitted, *Gokul Chandra v Radha Go-rinda*, 14

CLJ 108 AIR 1926 Cal 1210 97 IC 1013 Formerly, notice had to be given also to the insolvent, and in case of his death, to his representatives, *Sripat Singh v Prodyat Kumar*, 48 Cal , 87 57 IC 810 But now, notice is to be given to the Receiver instead The name of a creditor should be entered in the schedule until the Court has considered any cause that might be shown against so doing, *Amir Chand v Anukul Chandra*, AIR 1926 Cal 160 90 IC 802

At any time There is no limitation fixed for a creditor to come in and prove his claim, *Laksh*

Lapse of time—no bar for proving a debt *manan v Mutia*, 11 Mad , 1, see also *Madho Prosad v Bhole Nath* 5 All , 268, *Parsadi v Chunni Lal*, 6 All 142,

Harapriya v Shama Charan, 16 Cal , 592 *Ashrafuddin v Bejin Behari* 40 Cal , 407, *Sheoraj v Gansi*, 21 All , 227, and the matter has practically been left to the discretion of the Court, *Jan Bahadur v The Bailiff*, 5 Rang 384 AIR 1927 Rang 263 104 IC 816 A creditor is entitled to tender proof of his debt at any time during the administration so long as there are assets to be distributed and no injustice is done to third parties, *Babu Lal Sahu v Krishn aPrasad*, 4 Pat , 128

AIR 1925 Pat , 438 6 Pat LT 410 85 IC 543 In fact the section does not enact a rule of limitation, *Sita Subramania v Theethappa* 47 Mad , 120 45 MLJ 166 (1923) MWN 895 18 LW 636 AIR 1924 Mad 163 75 IC 572 Lapse of time is no bar for proving a debt *Damodar Das v Hamud Raman*, AIR 1926 Oudh 621 3 OWN 793 98 IC 74

Cf *Anath Lalji v Cursetji*, 9 Bom LR 466 He may come at any time after adjudication and before discharge, and prove his debt and participate in the assets, provided there be any thing still available for distribution But the creditor who comes at the eleventh hour to prove his debt takes a great risk Because the other creditors who are already on the schedule, may come forward to challenge the validity of his debt, and without hearing such creditors the Court cannot include his name in the schedule *Allahabad Bank v Murlidhar* 34 All , 442 9 ALJ 577 The Insolvency Court is always bound to investigate the dispute when one creditor challenges the validity of a debt set up by another and cannot relegate either of them to a separate suit Cf *Khusali Ram v Bholarmal* 37 All , 252, *Amir Chand v Anukul Chandra*, AIR 1926 Cal 160 90 IC 802 As to the right of a creditor inadvertently omitted from the schedule to apply for admission into the rank of creditors see also *Re Cobbold* 36 Cal , 512 As the framing of a schedule by the Official Receiver under this section read with sec 80 (b) does not finally determine the matter, the creditor can apply under this sub-section (3) for the enlistment of his name in the

schedule Cf *Khadir Shaw v Official Receiver, Tinnevely* 41 Mad, 30

Barred debts Debts provable under this section are all debts to which the debtor is subject when he is adjudged an insolvent. Therefore, a debt not barred at the commencement of bankruptcy can be proved in insolvency even though it gets barred at the time of actual proof, *Damodar Das v Hamid Raman* AIR 1926 Oudh, 621 98 IC 74, following *Subramania v Theethiappa Pillai*, 47 Mad 120 45 M L J 166 (1923) M W N 895 18 L W 636 AIR 1924 Mad 163 75 IC 572 Cf *Babu Lal Sahu v Krishna Prasad*, 4 Pat 128 6 Pat L T 410 AIR 1925 Pat 438 85 IC 543, *Ex parte Ross* 2 Gl & Jameson's Bankruptcy cases, 46 and 330 *Ex parte Lancaster Banking Co* 10 Ch D 776, *Re Bouer v Chetwynd* (1914) 2 Ch 68 *Re Crosley* (1887) 35 Ch D 266, a debt barred by the statute of limitation is not provable in bankruptcy proceedings *Ex parte Deudney* (1808) 15 Ves 479, *Baranashi Koer v Bhabadab* 34 C L J 167, *Re Hepburn*, (1884) 14 Q B D 394 (400)

Notice Notice to the Receiver and the proving creditors is necessary for the inclusion of an *after coming* creditor in the schedule though subsection (1) provides for no such notice for the purpose of framing the schedule, *Allala bad Bank v Murlidhar supra*. This is obviously due to the fact that such intrusion involves disturbance of established rights and the maxim *audi alteram partem* applies Cf *Harper v Carr*, 4 R R 441, *Smith v R* (1878) 3 A C 614, *Satyendra v Narendra* 39 C L J 279 (282), *Sato Koer v Gopal Sahu* 4 Cal 929 12 C W N 65 also 25 C L J 149, 456 In the event of death of the creditors, the notice should be given to their respective representatives Cf *Sripat Singh v Prodyat Kumar, supra*

Amendment of Schedule In case of an evident mistake the schedule may be amended see Williams p 160, Cf *Ram Chander v Ma har Hussain* 51 IC 55 (All), *Exp Schofield* 12 Ch D 33 but an error in the Schedule cannot be rectified after the closing of the Insolvency proceedings, *Ibid* The schedule may be amended by including new creditors [s 33 (1)] or by striking out the names of creditors already entered in it [s 50] or by altering the amounts of claims or debts Cf *Panangupalli v Nanduri Ramachendrudu* 28 Mad 15 (15) I B *Mir a Ali v Quadiri Khanam* 21 P L R 1919 50 IC 774 Where the validity of any claim is challenged and the Court judicially determines the question it will have power to add or remove a name to or from the Schedule *Amir Chand v Anukul Chandra* AIR 1926 Cal 160 90 IC 802 and for that purpose it can consider the Receiver's report along with other

evidence, *Ibid* As to the Court's power to expunge entries in the Schedule, *vide* under sec 50, *post*

Discharge The discharge contemplated by this section means the *final* and not a *conditional* discharge of the insolvent, inasmuch as the effect of a *conditional* discharge is not to terminate the proceedings, *Babu Lal Sahu v Krishna Prosad*, 4 Pat 128 AIR 1925 Pat 438 85 IC 543 An order of discharge on condition that the insolvent, in consideration of a monthly allowance of Rs 25 for his maintenance, should place at the disposal of the Court all his after-acquired properties is not a discharge within the meaning this section, *Sita Subramania v Theethiappa* 47 Mad, 120 45 M L J 166 &c (*supra*)

Secured Creditor Under this section the Court has a general power to inquire into the validity of a secured debt, independently of the provisions of secs 53 and 54 (old secs 36 and 37), these sections being merely rules of evidence or special rules of substantive law applicable to particular kinds of transfer by the insolvent, *Dronadula, Sriramulu v Ponakavira Reddi*, 1923 M W N 306 45 M L J 105 18 L W 426 72 IC 805 Cf *Official Receiver, Tinnevely v Sankaralinga* 44 Mad, 524 40 M L J 219 (1921) M W N 236 14 L W 505 62 IC 495 The reason for this view is that the Court cannot possibly frame a schedule without determining the existence of the debt due to the secured creditor, *Ibid* but it is not very convincing to us Cf *Ellis v Silver* (1873) 8 Ch 83 42 L J Ch 669

Appeal Appeals from orders regarding entries in the Schedule may lie to the High Court, see sec 75 (2) and Schedule I An appeal will lie where a non provable debt is admitted in proof, *Sita Subramania v Theethiappa*, 47 Mad 120 45 M L J 166 &c (*supra*) See also 34 All 42, 24 C W N 401, *Anandji v James Finlay & Co* 62 IC 441 The determination of a question under this section is not a *decision* (though one would naturally expect it to be so) under section 4 for the purposes of a second appeal under sec 75, inasmuch as sec 4 is *subject to the provisions of the Act* which include both this section and the item of entry against sec 33 in Sch V—both of which make such determination to be by *order* and not by *decision*

34. [§ 28 (2)] (1) *Debts which have been excluded from the schedule on the ground that their value is incapable of being fairly esti-*

Debts provable under the Act

mated and demands in the nature of unliquidated damages arising otherwise than by reason of a

contract or a breach of trust shall not be provable under this Act

(2) [§ 28 (1)] Save as provided by sub section (1), all debts and liabilities, present or future certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act

Framing of the Section This is sec 28 of the repealed Act with its two sub-sections arranged in a reverse order, and with the addition of a new provision that the debts excluded from the schedule as unassessable under the *proviso* to sec 33 (1), shall not be provable. In view of sec 44 (2) "it has become necessary to provide that debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated shall not be debts provable under the Act, and we have provided accordingly"—Select Committee Report dated the 10th February, 1920. Comp sec 30 of the Eng Bankruptcy, Act, 1914

Meaning of Provable debts and Proof One primary effect of the bankruptcy of a person is that his creditors lose the right c
and in lie
that estate
estate
out of
The
debts and claims with reference to which the amounts of dividend are calculated are called *provable* debts and the method by which those debts and claims are established is called proof, see *Hira Lal v. Tulsiram* AIR 1925 Nag 77. 80 IC 946. The word 'provable' means "capable of proof" or "which may be proved" are allowed to be proved," *Hansraj v. Official Liquidators* (1929) A L J 811 (T B)

Sub-sec. (1) Under sec 45 (2) of the repealed Act a discharge released the insolvent *only* from the debts entered in the schedule but under the present section 44 (2), the insolvent enjoys greater benefit and is released from *all* *provable* debts whether entered in the schedule or not, vide notes under sec 44 (2). But as liability for the non assessable debts has to be kept in tact such debts have herein been declared non provable as well in view of the aforesaid alteration in the law

Dues of a secured creditor When a Receiver of the property of an insolvent realises the property, the debt due to a secured creditor constitutes a first charge on the amount realised. *Motiram v. Rodwell*, 21 A L J 32 L R 3 A 638

AIR 1023 All 150 *vide* notes under sec 47 If the sale proceeds of the mortgaged property are not sufficient to fully satisfy the claim of the secured creditor, he can prove for the balance, *Baranashi v Bhabader*, 34 CLJ 167 66 IC 758

Debts not provable Under this Act there are two classes of debts and liabilities which are not provable in Bankruptcy, namely, (1) *Contingent and future* debts and liabilities which in the opinion of the Court are incapable being estimated (2) Demands in the nature of unliquidated damages which arise otherwise than by reason of a contract, promise or breach of trust Under the English law there is also a *third* class viz, debts and liabilities contracted by the debtor with a creditor who has notice of an available act of bankruptcy But the Indian statute has not recognised this class of debts Compare sec 34 (1) with sec 57, clauses (1), (2) and (6) of the Bankruptcy Act 1883

Instances of debts excluded from the schedule [under the proviso to sec 33 (1)] as unassessable, are (i) non accruing rent for a lease, (ii) 'Alimony' ordered by a Court to be paid periodically by a husband to a wife which may not last and may be varied, see *Linton v Linton* (1885) 15 QBD 239, *Victor v Victor* (1912) 1 KB 247 *Kerr v Kerr* (1891) 2 QB 439 see at pp 152 & 256 *ante* (iii) Deferred dower is not provable being a *future* debt which may or may not become due, *Mirza Ali v Quadim Khanam* 21 PLR 1919 50 IC 74, because, it is well known that such a debt becomes payable only on the death of the husband or on divorce *Sughra Bibi v Gaja Prasad*, 12 IC 754 (All) Similarly, a decree for rent under the Agra Tenancy Act will not be provable *Parbati v Raja Shyam Rikh* 44 All, 296 20 ALJ 147 AIR 1922 All 74 66 IC 214

As to instances of unliquidated damages arising otherwise than by reason of a contract or a breach of trust, they naturally arise from tortuous acts, such as damages for assault and battery, *Halter v Sherlock*, (1771) 3 Wils 272 damages for trover, for seduction (*Buss v Gilbert* 1913 2 M & S 70) for misrepresentations in the prospectus of a company (*Re Giles Ex parte Stone* 1889, 61 LT 82) If such unliquidated damages become liquidated either by agreement or by award or a final judgment, they are provable Cf *Re Newman Ex parte Brooke*, (1876) 3 Ch D 494 When a claim is founded both on a tort and a contract, the tort may be waived and proof may be made on the contract, see *Halsbury's Laws of England* Vol II, p 198

Damages arising out of contracts are provable but there are some other liabilities which though arising out of contracts are not provable and are therefore not affected by an order of

discharge These contracts are generally such as do not contemplate any payment of money, but have remedies for their breach in an injunction or specific performance, *Re Reis*, (1904) 2 K.B. 769 Certain other contracts

Contracts which do not give rise to provable debts too do not give rise to provable liabilities, e.g. a promise to marry, a covenant not to molest, or not to carry on a particular trade etc. Illegal contracts

also do not give rise to provable liabilities, *Herman v Jeuchner* (1885) 15 Q.B.D. 561, so, debts for stifling a prosecution or for compromise or compounding of a felony or an offence, or gaming debts cannot be proved, *Ex parte Thompson*, (1746) 1 Atk., 125, *Ex parte Elliott* (1837) 2 Dea 179, *Re Lopes* (1880) 2 Morr 245 The untaxed costs are not debts provable in bankruptcy as they are not debts or liabilities, certain or contingent to which the debtor either was or might become subject within the meaning of this section, *Re Pitchford* (1914) 2 Ch D 260 A gaming debt is not provable, (1808) 15 Ves

479, *infra* A debt barred by limitation cannot also be proved, in bankruptcy,

Ex parte Roffey, (1815) 2 Rose, 245 *Re Crossley*, 35 Ch D 266 *Baranashi v Bhabader*, 34 C.L.J. 167 66 IC 758 (following 15 Ves 479) * A debt does not become barred by lapse of time if it is was not so barred at the commencement of the bankruptcy, 34 C.L.J. 167 (*supra*), *Sita Sabramania v Theethiappa* 47 Mad 120 45 M.L.J. 166 18 L.W. 636 (1923) M.W.N. 895 A.I.R. 1924 Mad 163 75 IC 572, *Boyer v Chetayned* (1914) 2 Ch 68, also see notes under "Barred debts" at p 222 Debts not barred on the date of adjudication can be proved in insolvency even though they become time-barred at the time of proof, *Damodar Das v Hamid Rahaman*, A.I.R. 1926 Oudh 621 98 IC 74 A debt incurred after adjudication is not provable, *vide* notes at p 229 *infra*

Sub-section. (2) : Provable Debts Excepting the two classes of debts mentioned in sub-section (1) all other debts or liabilities (whether present or future certain or contingent) may be proved provided (1) the insolvent is subject to them when he is adjudged an insolvent or (2) he becomes subject to them before his discharge by reason of an obligation incurred before adjudication, that is, the debt must accrue before adjudication, debt accruing before discharge may be proved if the obligation giving rise to the debt was incurred before adjudication Cf *Ex parte Stone* (1873) 8 Ch App 914 Thus, it has been said that in order that a particular debt contracted after the order of adjudication may be a debt provable in insolvency proceedings, the debt should have existed at the date

of order of discharge or if contracted subsequent thereto, should have been based on a liability existing at the time of adjudication *Sisram v Ram Chander*, (1930), A L J 350 AIR 1930 All, 104. Obligations incurred after the date of adjudication are not debts provable under this Act, *Gang Pershad v Fedra Ali*, 48 IC 913 (Nag). *Vide* notes under the heading "Before adjudication", *infra*. The words, "obligations incurred" refer to an obligation incurred by the insolvent himself, *Kesheorao v Gotindrao*, 6 N L J 279 AIR 1923 Nag, 142 68 IC 340, and will cover an obligation incurred by the insolvent managing member of a joint family for himself, or on behalf of the other minor members thereof, *Vithal v Ram Chandra*, 19 N L R 128 AIR 1923 Nag 257 71 IC 32. The absence of a decree under O XXIV, r 6, C P Cod will not in law debar a creditor from proving his debt in insolvency proceedings. All that is necessary for the purposes of insolvency proceedings is to prove the existence of the debt. *Batu Lal Sahu v Krishna Prasad*, 4 Pat 128 AIR 1925 Pat 438 6 Pat L T 410 IC -43.

The policy of the Act is to make the insolvent a freed man—freed not only from debts but from all obligations incurred before adjudication which could in fullness of time, ripen into debts. Cf *George v Richard*, (1888) 1 A C 351, (1888) 2 Q B D 90, (1881) 1 Ch App 31, (1881) 18 Q B D 64. Damages arising out of a breach of contract though undated for the time being, may be proved, *Re Omerto Lall* 1 B L R App 2. Liabilities from forward contracts may be proved, *Re Moosaji Lotia* 5 S L R 249 15 IC 825, *In re Jraanji*, 6 S L R 187 19 IC 653, *Re Dholan Das*, 56 IC 158. Unliquidated damages may at times be proved though the debtor has been guilty of fraud, (1882) 9 Q B D 11. The liability to restore money or property obtained by fraud may be a provable debt, (1878) 8 Ch D 807. The debt resulting from a breach of trust is provable, (1880) 17 Ch D 122 (1903) 1 K B 439. Arrears of maintenance are provable, *Tok Bibi v Abdul Khan*, 5 Cal, 536. Cf *Halfhide v Halfhid* 50 Cal 867. An annuity is an instance of contingent liability. It is provable and is capable of being estimated, *Ex parte Blackmore*, (1877) 5 Ch D 372. Cf *Ex parte Jackson*, 20 W L 1027, *Lictor v Lictor* (1912) 1 K B 247, *Ex parte Nea* (1880) 14 Ch D 579. The contingent

Contingent liability of liability of a surety who has not been called upon to pay or has not in fact paid is a provable debt. *Re Paine*, (1891) 1 Q B 122, *Re Blackpool Motor Co Ltd* (1901) 1 Ch 77. *Re Moss*, (1905) 2 K B 307, *Gangadhar v Kanhai* 50 All 606 26 A L J 425 AIR 1928 All 306 109 IC 421 (1) Al. see *Re Snowden*, 50 L J Ch 540, 17 Ch D 44, *Paul v Jo*.

1 Term Rep 599, a surety for an entire debt paying only a part cannot in equity stand in the shoes of the party he pays off, *Ex parte Rushforth*, 10 Ves 420. When the surety himself turns out insolvent, the creditor can prove on the guarantee by the surety, *Ex parte Young*, (1881) 17 Ch D 668. Money held 'in suspense' is a trust and therefore cannot be a provable debt see *Official Assignee v Rajan Aiyar*, 36 Mad, 499 F B. See also 33 Mad, 299. Cf *Re Charri*, 2 Mad, 13, according to which property held by a bankrupt in trust for others is not his property. When goods bailed to a person who becomes insolvent are lost to the true owner by virtue of the doctrine of reputed ownership, the latter has no right of proof to the extent of his loss. *Re Bullon Ex parte Haiside*, (1907) 2 K B 180. Commission for finding a purchaser is provable, *Re Beate Ex parte Durrant* (1888) 5 Morr 37. Proof may be made on an implied promise to indemnify, *Ex parte Ford*, *Re Chappell*, (1885) 16 Q B D 305. *George v Richard*, (1888) 13 A C 351. Money held in deposit with a bank is a provable debt, *Karlar De v Surasati*, 9 P R 1908, *Official Assignee Madras v Smith* 32 Mad 68, *Official Assignee, Madras v Rajam Aiyar* 33 Mad 299 (*supra*). Unpaid call money may be proved *Re Mercantile M M Ins Co* 25 Ch D 415. The transferee of immoveable property who purchases such property with or without notice of charge on the same is a person interested in the payment of the debt charged within the meaning of sec 60 of the Contract Act and in case such transferee pays off such debt the payment becomes a debt for money paid to the transferor which can be proved in insolvency, *Ganga Sahai v Sundar Lal A I R* 1930 Oudh, 266.

Debts See p ~ ante

Liabilities This word has not been defined in this Act but we have got a definition for it in Sec 30 (8) of the Bankruptcy Act 1914. According to that section, this word includes "any compensation for work done, any obligation to pay money on the breach of any express or implied covenant, contract, agreement or undertaking," (See the entire section).

Private arrangement, if estops creditor from proving debts There can be no estoppel against the statute, so where the arrangement is invalidated by reason of contravention of any statutory provision it will not debar the creditor from proving his claim. *Re a Bankruptcy notice*, (1924) 2 Ch D 76. Again, there will be no estoppel where the arrangement is brought about by fraudulent representation. Thus where a composition was the result of a fraudulent inducement, the Court held that the creditors will not be debarred from proving their debts by reason of it, *Beharilal v Harsukhdas*, 25 C W N 137.

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Before Adjudication A debt to be provable under this section must be a debt to which the insolvent has become subject by reason of an obligation incurred before the *date of adjudication*, *Keshavao v Govindrao*, 6 N L J 279 A I R 1923 Nag 142 68 I C 340, *K N K T Chetty v Batin*, 13 Bur L T 117 61 I C 640 That is, the debt must accrue *before* adjudication. If it accrues after adjudication and before discharge it is provable only if the obligation giving rise to the debt was incurred before adjudication, *Official Trustee of Bengal v Kissen Gopal* 51 C L J 392 14 C W N 751 So it has been held that a debt incurred *after* adjudication is not provable under the Act, *Hiralal v Tulsiram* 22 N L R 118 A I R 1925 Nag 77 50 I C 940 Cf *Re Pilling* (1909)

Debt incurred after adjudication not provable 2 K B 988 Therefore, where a promise is executed by the insolvent long after the date of the adjudication, the creditor cannot prove the debt under this Act, but follow his ordinary remedy *Kallu v Agha Salim*, 2 O W N 659 A I R 1925 Oudh, 668 89 I C 923, *Hiralal v Tulsiram supra* That is to say a suit can be maintained on an obligation incurred by the insolvent after adjudication, it not being a debt provable in bankruptcy, Sec 28 (2) is no bar to such a suit, *Ganga Prasad v Feda Ili* 48 I C 913 (Nag) Rents which fall due from an insolvent after the making of the order of adjudication cannot be deemed to be a debt existing on the date of the order, and cannot be proved this section not applying thereto, *Kuer Behari Lal v Kalka* 9 O L J 157 A I R 1922 Oudh, 73 67 I C 549 This is so, because in such a case there was antecedent obligation accruing for the liability to pay the rent, 51 C L J 392, *supra* As to debts not getting barred *before adjudication*, vide notes at pp 222, 226, ante The point of time with reference to which the question as to whether the recovery of a debt is barred by time or not should be determined is the date of the adjudication, *Syed Ijaz Husain v Lachman Das*, 9 O & A L R 796 A I R 1924 Oudh, 351 75 I C 790 Under the English Statute, a debt incurred *after* notice of an act of bankruptcy is non provable, but under this Act, it is non provable only if incurred *after* adjudication and not merely *after* notice of the act of bankruptcy, Comp sec 30 (2) of the Eng Bankruptcy Act, 1914 So, it is the date of *actual adjudication that is the day of cleavage between provable and non provable debts* A question may be raised whether the date of adjudication will relate back to the date of presentation of the bankruptcy petition by reason sec 28 (-)

Joint Debts: Where one member of a *joint* Hindu family is declared insolvent the creditor must prove the whole debt in the Insolvency Court and should not split up the debt between the insolvent and the non insolvent members, *Vith*

1 Term Rep 599, a surety for an entire debt paying only a part cannot in equity stand in the shoes of the party he pays off, *Ex parte Rushforth*, 10 Ves 420. When the surety himself turns out insolvent, the creditor can prove on the guarantee by the surety, *Ex parte Young*, (1881) 17 Ch D 668. Money held in suspense" is a trust and therefore cannot be a provable debt see *Official Assignee v Rajan Aiyar*, 36 Mad, 499 F B. See also 35 Mad, 299. Cf *Re Charri* 2 Mad, 13, according to which property held by a bankrupt in trust for others is not his property. When goods bailed to a person who becomes insolvent are lost to the true owner by virtue of the doctrine of reputed ownership the latter has no right of proof to the extent of his loss. *Re Bulton Ex parte Ha side* (1907) 2 K B 180. Commission for finding a purchaser is provable, *Re Beate, Ex parte Durrant* (1888) 5 Morr 37. Proof may be made on an implied promise to indemnify *Ex parte Ford, Re Chappell*, (1885) 16 Q B D 305. *George v Richard* (1888) 13 A C 351. Money held in deposit with a bank is a provable debt, *Karlar De-1 v Surasalt* 9 P R 1908. *Official Assignee Madras v Smith* 32 Mad 68. *Official Assignee Madras v Rajam Aiyar*, 35 Mad 299 (*supra*). Unpaid call money may be proved, *Re Mercantile M M Ins Co* 25 Ch D 415. The transferee of immoveable property who purchases such property with or without notice of charge on the same is a person interested in the payment of the debt charged within the meaning of sec 69 of the Contract Act and in case such transferee pays off such debt the payment becomes a debt for money paid to the transferor which can be proved in insolvency, *Ganga Sahai v Sundar Lal* A I R 1910 Oudh 266.

Debts See *ante*

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Before Adjudication A debt to be provable under this section must be a debt to which the insolvent has become subject by reason of an obligation incurred before the date of adjudication *Keshe Rao v Gorind Rao* 6 N L J 279 A I R 1923 Nag 142 68 I C 340, *K N K T Chetty v Batin* 13 Bur L T 11 61 I C 640 That is, the debt must accrue before adjudication If it accrues after adjudication and before discharge it is provable only if the obligation giving rise to the debt was incurred before adjudication *Official Trustee of Bengal v Kissen Gopal* 51 C L J 192 14 C W N 51 So it has been held that a debt incurred after adjudication is not provable under the Act *Hiralal v Tulsiram* 22 N L R 118 A I R 1925 Nag 659 89 I C 945 Cf *Re Pilling* (1909)

Debt incurred after 2 K B 988 Therefore, where a promote
adjudication not pro- is executed by the insolvent long after
vable the date of the adjudication, the creditor

cannot prove the debt under this Act, but follow his ordinary remedy *Kallu v Agha Salm*, 2 O W N 659 A I R 1925 Oudh, 668 89 I C 923, *Hiralal v Tulsiram supra* That is to say a suit can be maintained on an obligation incurred by the insolvent after adjudication, it not being a debt provable in bankruptcy, Sec 28 (2) is no bar to such a suit *Ganga Prasad v Feda Ali*, 48 I C 913 (Nag) Rents which fall due from an insolvent after the making of the order of adjudication cannot be deemed to be a debt existing on the date of the order and cannot be proved this section not applying thereto, *Kuer Behari Lal v Kalka* 9 O L J 157 A I R 1922 Oudh, 73 67 I C 549 This is so because in such a case there was antecedent obligation accruing for the liability to pay the rent, 51 C L J 392, *supra* As to debts not getting barred before adjudication, vide notes at pp 222, 226, ante The point of time with reference to which the question as to whether the recovery of a debt is barred by time or not should be determined is the date of the adjudication, *Syed Ijaz Husain v Lachman Das*, 9 O & A L R 796 A I R 1924 Oudh, 351 75 I C 790 Under the English Statute, a debt incurred after notice of an act of bankruptcy is non provable, but under this Act it is non provable only if incurred after adjudication and not merely after notice of the act of bankruptcy, Comp sec 30 (2) of the Eng Bankruptcy Act, 1914 So, it is the date of actual adjudication that is the day of cleavage between provable and non provable debts A question may be raised whether the date of adjudication will relate back to the date of presentation of the bankruptcy petition by reason sec 28 (7)

Joint Debts: Where one member of a joint Hindu family is declared insolvent the creditor must prove the whole debt in the Insolvency Court and should not split up the debt as between the insolvent and the non insolvent members, *Vithal*

γ Ram Chandra, 19 N L R 128 A I R 1923 Nag 257. 72 I C 327

Damages in tort Damages in tort are provable only where the judgment is signed before the date of the receiving order (admission of petition), *Re Newman*, (1876) 3 Ch D 494. Cf *Ex parte Green*, 2 D & C 713, *Ex parte Westcott*, L R 9 Ch Ap 626.

Expenses of Administration—See *Official Trustee v. Kissen Gopal*, 34 C W N 751 51 C L J 392

Annulment of adjudication

35. [§ 42 (1)] Where, in the opinion of the

Power to annul adjudication of insolvency
Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication, *and the Court may of its own motion or on application made by the Receiver or any creditor annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of section 10, not entitled to present such petition**

Amendment of 1927 Vide the footnotes The amendment is virtually superfluous, because an adjudication in contravention of sec 10 (2) is one which should not have been made and as such is liable to annulment under the opening words of this section. The only difference made by the amendment, however is that it permits the Court to act *suo motu*, while under the first part of the section, the Court can move to annul only on the application of the person interested

This Section corresponds to section 42 (1) of the Act of 1907 and to sec 29 of the English Bankruptcy Act, 1914. It makes provision for the annulment of an adjudication order. There are three grounds for annulling an adjudication order under this section, viz, (a) Where in the opinion of the Court,

* The lines in italics have been added by the Amending Act VI of 1927. By this amendment the provisions of this Act are brought into line with the amendments made in sec 21 of the Presidency Towns Insolvency Act—Vide *Statements of Objects and Reasons*

a debtor ought not to have been adjudged an insolvent, (b) where the debts of the insolvent are paid in full and the fact of such payment is satisfactorily proved before the Court, (c) where the adjudication was in contravention of sec 10 (2), *ante*, an order of adjudication can be annulled under this section only upon proof of the existence of one or both of the circumstances herein specified *Motilal Radhakissen v Ganpat Ram*, 23 C L J 220 21 C W N 936 34 I C 792, *Jam Khan v Devi Datta* -- P W R 1915 29 I C 888, *Seshaiyangar v Venkata Chalam* 31 I C 15 Where the debts of the insolvent have not been paid in full or it has not been established that the debtor was unjustly adjudged an insolvent, an order of annulment could not be made, *Ramchandra v Shama Charan*, 18 C W N 1952 19 C L J 83 21 I C 950 The Court has no jurisdiction to order an annulment under this section until all the debts due from the insolvent have been paid off, *Bhagwan Singh v Chedilal* 3 O W N 296 99 I C 279 It is not open to the insolvent to contend that an order of annulment of adjudication is invalid merely because of want of notice to the creditors *Kallukutti Parambath v Puthen Peetikakkal* 49 M L J 595 22 L W 542 A I R 1926 Mad 123 91 I C 144 The occasions for exercising the power of annulling an adjudication hereunder on the ground that it ought not to have been made are more restricted than under the Presidency Towns Insolvency Act see *Alamelumanga Thayarammal v Balusami*, (1928) M W N 62 A I R 1928 Mad 394 108 I C 208 Where an application of a creditor is dismissed under s 25 (1) *supra*, there can be no order of annulment under this section, *Bahram v Supadasa* 121 I C 55 (1915) Notice that this section uses the word "shall", whereas the corresponding section of the English Statute (sec 29 of the Act of 1914) only gives a discretion to the Court

Who can apply for annulment Such application can be made (a) by the debtor himself, (b) by any other person interested So persons other than the creditors can also apply for annulment For instance, the insolvent's transferee who is interested in the annulment for his safety may make an application under this section The expression "any other person" is wide enough to include a creditor Whoever makes the application, it is always obligatory upon the applicant to establish the existence of one or more of the circumstances mentioned in this section, *Motilal v Ganpatram*, 23 C L J 220 21 C W N 936

The first part of the section contemplates two contingencies for annulment of adjudication but does not indicate which persons are entitled to apply for annulment in which contingency For example, at the instance of a creditor a debtor is adjudged an insolvent

now is it open to that petitioning creditor to turn round and say that he should not have been so adjudged and pray for annulment? Perhaps that cannot be, for, the law never allows a person to *approbate* and *reprobate*, *Cavendish v Dacre*, 31 Ch D 466. Similarly, an adjudication, obtained on the debtor's application, cannot be annulled at his instance, for the law will not permit him to turn round and contend that the adjudication order was improperly obtained, *Motilal v Ganpat Ram*, 23 C L J 220 (222), *supra*. It seems probable that though the adjudication has been at the instance of a creditor, such creditor can pray for annulment on the ground of full payment as in such a case the doctrine of *Cavendish v Dacre* is not contravened. Similarly, a debtor too can ask for annulment on the ground that he has fully satisfied the claims of his creditors. So, which person can apply for annulment in which contingency will depend upon the circumstances of each case.

Notice Notice of the motion for annulment should always be given to parties likely to be affected by it. Cf (1893) 2 Q B 219, *Robson*, p 226, also the cases at p 108, under the heading "Notice."

Madras Insolvency Rules Under Rule 26 of O III of Madras Insolvency Rules, if an order of adjudication is made without service of the petition, the debtor may, within 8 days after service of the order or such further time as allowed by the Court, apply by *notice of motion* supported by an affidavit, to annul the order. But where no notice of adjudication order is given, an application made more than 8 days thereafter will not be barred, *Doraiswami v Official Assignee*, (1926) M W N 568.

Ought not etc. In order to justify an order of annulment hereunder it must be shown that the debtor ought not to have been adjudged insolvent and in order to show that one or other of the grounds mentioned below must be made out. Cf *Re Subrat Jan*, 38 Bom 200. The words "ought not etc" cover all the grounds mentioned in sec 25 for which an insolvency petition can be dismissed under that section, though, it should be noticed that the section does not specifically say anything about the abuse of the processes of the Court, *Velayuda v Subramania*, (1928) M W N 175. AIR 1928 Mad 609. 109 I C 636. Therefore, the reasons that prevail under sec 25 for refusing an adjudication may justify an annulment under this section, *Behari Sahu v Juthar Mall*, 38 I C 822. So an adjudication can be annulled on the ground of fraud, or that it was an abuse of the processes of the Court, *Ex parte Painter, Re Painter*, (1895) 1 Q B 82, *Re Bright, Ex parte Hingfield and*

Annulment for abuse of the processes of the Court

Blen, (1903) 1 K B 735, *Boaler v Power*, (1910) 2 K B 229, *Malchand v Gopal* 44 Cal 899 25 C L J 83 21 C W N 298, *Re Balla chand Serojic* 27 C W N 739 (a case under the Presi T Insolv Act), or on the ground that adjudication was secured on a petition defective in material respects, *Ex parte Coombes* (18--) 5 Ch App 9-9, or upon allegations that the debtor has absconded which turn out to be untrue upon evidence, *Re Bright* 1903, 1 K B 735 or on the ground that the order of adjudication was made by a Court which had no jurisdiction, *Ram Kamal v Bank of Bengal*, 5 C W N 91, or on the ground that the order of adjudication ought not to have been made and that the act of insolvency on which the order was based did not really exist *Karuthan Chettiar v Raman Chettiar*, A I R 1906 Mad 1159 (21) 24 L W 486 9- IC 590, or, on the ground of concealment of assets at the time of adjudication, *Ramlal v Mahadeo infra* Read the observations of Mookerjee J in 25 C L J 83, at pp 88 89 "under the law of England question is raised A Court has jurisdiction to annul an order which it had no jurisdiction to make, *Rashmoni v Ganoda*, 20 C L J 21, , so where an infant is adjudged an insolvent, the Court has the power to annul the adjudication, *Jagmohan v Grish Babu* 42 All 515 18 A L J, 611 58 IC 537, *Sannyasi v Asutosh*, 42 Cal 225 Likewise, where a bankruptcy proceeding was started against a dead person, as an insolvent), the order of adjudication should be annulled, *Ex parte Geisel, Re Stranger*, (1882) 22 Ch D 436 An adjudication can also be annulled on the ground that it was to extort money from the debtor, or that there are no assets to be distributed or that it was obtained by fraud, *Ram Kamal v Bank of Bengal*, 5 C W N 91 Cf *Tulsidas Lallubhai v Bharatkhand Cotton Mill Co*, 39 Bom 47 Where adjudication follows from compliance with the requirements of the law, no objection can be urged with respect thereto on the ground that the insolvent abused the processes of the Court because he had contracted debts in transactions on which he embarked without any capital or assets *Velayudha Nadar v Subramania*, (1908) M W N 175 A I R 1928 Mad 609 109 IC 636 A Court while annulling an adjudication must find that the adjudication could not legally or properly have been made on the facts as existing at the time of the adjudication Subsequent misconduct on the part of a petitioner should not lead to annulment of adjudication, *Jam Khan v Devi Ditta*, 29 IC 888 77 P W R 1915 152 P L R 1915 Undue preference to one creditor is no ground for annulment of adjudication, *Malchand v Gopal Chandra*, 44 Cal, 899 25 C L J, 83 21 C W N 298 39 IC 199 The mere fact that an insolvent had transferred some of his properties to another before the date of his adjudication and had not stated that fact in his application for adjudica-

tion is not a ground for annulment of adjudication where no fraudulent concealment of assets is involved, although it is undoubtedly open to the Court to consider whether the transfer is voidable against the Receiver under the provisions of s 53. *Ramlal v Mahadeo* 5 O W N 89 3 Luck 323 A I R 1928 Oudh, 404 110 I C 113

It is no ground to annul an adjudication under this section to say that the petitioner will subsequently be able to pay his debts in full or that his property is non transferable or that he has not made over his income to the Receiver or so forth, *Jam Khan v Debi* 77 P W R 1915 152 P L R 1915 29 I C 888. Absence of available assets is no ground for annulling an adjudication *Shera v Ganga Ram* 37 I C 214 171 P W R 1916. Even when all the creditors give their consent to a composition or scheme of arrangement that will not be sufficient to justify an order of annulment *Motulal v Ganpatram*, 23 C L J 220 (274) 21 C W N 936 34 I C 792. The Court is not bound by the *consent of all the creditors*. The creditors may be careless of their best interests and the question of annulment may involve larger issues of commercial morality and public interests. So the Court before acceding to the creditor's consent must consider whether the proposed scheme is for the benefit of the creditors as a whole whether it is conducive or detrimental to the commercial morality of the country, whether it is likely to imperil the interests of the future creditors, see *Re Hester* (1889) 22 Q B D 632 *Fe Flaton* (1893) 2 Q B 219. Read the observations of Lord Esher M R Bowen L J and Fry L J quoted at pp 223 24 of 23 C L J. The language of the section is somewhat vague and it seems that it has designedly been made so in order that the Court may be able to do full and complete justice see 22 Q B D 632 (Cave J)

Paid in full Full payment is necessary otherwise there can be no annulment *Re Burnett Ex parte O R* (1894) 63 L J (Q B) 423 *Re Keel* (1905) 2 R B 666 followed in *Re Subratil Jan* 38 Bom 200, therefore an annulment on payment of only some of the creditors is without jurisdiction and cannot be upheld *Bhugwan Singh v Chaudhri* 99 I C 277 (Oudh). The word 'debts' includes subsequent interest and therefore so long as such interest remains unpaid there is no full payment *Muhammad Ibrahim v Ram Chandra* 48 All, 772 24 A L J 244 (24) *infra*. When an insolvent effects a composition with his creditors in full discharge of all his liabilities he can no longer be regarded as an insolvent, and consequently the insolvency proceedings should be dropped by the Court *Ram Kishen v Mst Umrao Bibi* 33 I C 730. So P W R 1916. There is no full payment, simply because the

creditors have given to the bankrupt *absolute* release or *complete* and *full* discharge from their debts, and therefore there can be no annulment under this section on that ground, even though the creditors assent to it, *Re Gill, Ex parte Board of Trade* (1882) 5 Morr 272 Cf *Re Hester* (1889) 22 Q B D 632, *Muhammad Ibrahim v Ram Chandra*, 48 All, 272 24 A L J 244 A I R 1926 All, 280 92 I C 514, *actual* payment of the debts *in full* is essential, *Kottapalli Bapayya v Official Receiver of Guntur* (1929) M W N 910 57 M L J 817 30 L W 1040 A I R 1930 Mad 112 124 I C 134 A private arrangement of the insolvent to pay four annas in the rupee in *full* satisfaction of the claims of his creditors is not tantamount to *full* payment and therefore cannot justify an annulment under this section, *Breeji Kishore v Official Assignee, Madras*, 43 Mad 71 37 M L J 244 52 I C 979 The section does not say anything about the *mode* of payment The payment may be made by the insolvent himself or by some body else on his behalf The Court cannot refuse to annul an adjudication simply on the ground that the *full* payment has not been made through the Official Receiver, *Elajudham v Official Receiver*, 52 I C 619 27 M L T 130 (1919) M W N 622 Cf *Behari Lal v Harsukdas*, 25 C W N 13—in which it has been held that a payment of annas eight in the rupee in full satisfaction of the claims of the creditors without the intervention of the Court or the Receiver after a scheme for composition has been rejected could not be recognised in insolvency proceedings Interest subsequent to the date of the adjudication though it cannot be taken into account at the time of the first distribution of the dividends, is part of the debt and unless such interest also is paid there is no full payment within the meaning of the section, *Muhammad Ibrahim v Ramchandra, supra*

Annulment of adjudication An order of adjudication can be annulled upon proof of one or both of the circumstances mentioned in this section *Motilal v Ganpatram*, 23 C L J 220 21 C W N 936 The order of adjudication can also be annulled under sec 43 when the insolvent fails to apply for discharge within the time allowed by Court or under sec 39 when a scheme is approved and accepted or under sec 36 to avoid concurrent orders A Court has no power to annul other wise than in exercise of the authority vested in it by the statute *Re Hester*, (1889), 22 Q B D 632 *Re Painter* (1895), 1 Q B D 85 *Motilal v Ganpatram*, 23 C L J 220 (1922) 21 C W N 936 The discretion of the Court in annulling adjudication cannot be limited except in manner provided by the statute, *Abdul Kuddus v Mutual Indemnity & Finance Corpn* 51 C L J 545 Therefore, an order of annulment must refer to some section or other of this Act This section says "the Court shall annul," whereas the corresponding section (sec 29) of the

English Bankruptcy Act, 1914, uses the word "may" This variation in the phraseologies of the Indian and English statutes may be made the foundation of a possible contention that when one or more of the circumstances specified in this section is or are established, an Indian Court cannot refuse to make an order of annulment Cf *Motilal, Radha Kishen v Ganpat Ram*, 23 C L J 220 21 C W N 936 34 I C 792 An adjudication cannot be annulled for failure to deposit costs of publication under s 30, *Har Kishore v Masum Ali*, 6 O W N 1093 A I R 1930 Oudh 53 124 I C 368 It seems that an order of annulment cannot be made by the Court *suo motu* there must be some application either by the debtor or by some interested person The order of annulment must be *in writing* Annulment of adjudication has not the same effect as a discharge, *Khalil-ul Rahman v Ram Sarup* 8 L L J 286 A I R 1926 Lah 489 95 I C 204 Therefore, an order of annulment cannot prevent a creditor who has not proved his debt from proceeding to enforce it in a Civil Court, *Motumal Kishindas v Ghanshamdas*, A I R 1929 Sind 204 As to the effect of an annulment see sec 37, *post* A judgment vacating an order of adjudication passed against a person on the ground that he was not proved to be a partner of the insolvent firm is a negative judgment and amounts to nothing more than holding that sufficient grounds have not been made out for adjudicating such person an insolvent Such a judgment is not one *in rem* within s 41 of the Evidence Act, *Firm of Radhakishen v Gangabai*, 22 L R 105 A I R 1928 Sind 121 110 I C 730

Which Court to annul when order of adjudication is made by an appellate Court The word "Court" always means the District Court, therefore the application for annulment should be made to the District Court notwithstanding the fact that the order of adjudication was made by the Appellate Court, *contra* 7 Mor 78

Limitation There is no bar of limitation for application for annulment, *Harish Chandra v E I Coal Co, Ltd*, 16 C W N 733 (a case under the Presidency Act) Therefore an objection on the ground that the application for annulment was not made till after the lapse of a considerable time cannot be entertained for the first time on appeal, *Ibid*

Appeal The order annulling adjudication is appealable to the High Court under sec 75 (2) and Schedule 1 Cf *Motilal v Ganpatram, supra* In an appeal by the insolvent against an order refusing to annul an adjudication, the receiver and the petitioning creditor ought to be made respondents Comp *Ex parte Ward*, (1880) 15 Ch D 292

36 [§ 17] If in any case in which an order of adjudication has been made, it shall be proved to the Court by which such order was made that insolvency proceedings are pending in another Court against the same debtor, and that the property of the debtor can be more conveniently distributed by such other Court, the Court may *annul the adjudication or stay all proceedings thereon*

Power to cancel one of concurrent orders of adjudication

The Section This is old section 17 with slight verbal changes, see "Change of law" below. It empowers the Court to cancel an order of adjudication or to stay proceedings in the event of multiple insolvency proceedings against the debtor. Before the Court can make an order under this section two conditions must be satisfied—(1) The adjudicating Court should be satisfied that the insolvency proceedings are pending against the same debtor in another Court, (2) that the debtor's property can be conveniently distributed by such other Court. Concurrent proceedings generally lead to friction or conflict of jurisdiction (Cf *Sridhar Choudhury v Mugniram*, 3 Pat 357-8 I C 620) and the present section serves to guard against that evil. Where such a conflict of jurisdiction arises, it is but expedient that one Court should yield to another having regard to questions of convenience. Read the observations of Marten J. in *Re Maneckchand Virchand*, 47 Bom 275, 24 Bom L R 872 (ref to in 48 Mad 514). See also *Re Aranaayal Sabaputti*, 21 Bom 297. The word "pending" makes the section look as if it does not contemplate an adjudication by the *other* Court. That cannot be so, as is evident from the words "concurrent orders" in the marginal notes. Therefore, *pending* must mean pending whether before or after adjudication by the other Court. This section should be read with sec 77, *post*. It should be noticed that power has been given hereunder to the Court to stay its own proceedings. This is so because a Court which has no power of superintendence over another Court cannot interfere with the proceedings of that Court. Cf 47 Bom 275, 56 Cal 712.

Where there are successive adjudications in insolvency by two Courts, the insolvent's properties vest in the Receiver appointed by the Court making the *prior adjudication*, and the subsequent adjudication does not operate to divest such Receiver of those properties. When it is found convenient that the insolvent estate should be administered by the Court making the *subsequent* adjudication, steps should be taken to annul the prior adjudication, *Official Assignee, Madras v Official Assignee*,

Rangoon, 42 Mad, 121 35 M L J 533 24 M L J 455 49 I C 210 (relied on in 61 I C 300) Read the comments on this case in 37 M L J 34 (N I C) An order passed by the Bombay High Court under the Imperial Act, 11 and 12 Victoria Cl 21, vesting the property of the debtor in the Official Assignee of Bombay and passed subsequently to an order in insolvency by the Insolvency Court at Amritsar had the effect of vesting the insolvent's property in the Punjab in the Official Assignee of Bombay, *Official Assignee, Bombay v Registrar Amritsar*, S C C, 37 Cal, 418 14 C W N 569 11 C L J 443 7 A L J 357 12 Bom L R 395—followed in 40 Cal 78 It should be noticed that the jurisdiction of each Bankruptcy Court (under the English Act) is partly local and partly Imperial see *Halsbury's Laws of England*, Vol II, p 6 Cf *Re Naoroji Sorabji*, 33 Bom, 462 As regards its local jurisdiction it is confined to classes of debtors who, by the express terms of the Act are made subject to its jurisdiction by residence or domicile The imperial nature of the jurisdiction consists in this that it empowers an English Bankruptcy Court to discharge debts wherever contracted, i.e. to say, an order of discharge by an English Court will discharge a debt contracted in a Colony or Colonial State, *Bartley v Hodges*, (1861) 30 L J Q B 352, and the provisions of the English Act as to vesting of property in the Receiver extend all over the Empire so that upon the adjudication of an insolvent by a Bankruptcy Court of England, even his Colonial properties vest in the English Receiver, *Callender Styles & Co v Secretary of Lagos & Dependencies* (1891) A C 460 *Vide* notes at p 5, *ante*

Change of Law The old Act defined the Court's power in these words—"The Court may rescind the order of adjudication and stay all proceedings or dismiss the petition etc." The present Act simply says that "the Court may annul the adjudication and stay all proceedings" The language of the present section is more appropriate

Another Court "Another Court" does not obviously mean a foreign Court It is doubtful whether "Court" here means only a Court exercising jurisdiction under this Act Under the repealed Act the word "Court" always meant a Court exercising jurisdiction under the Act But that definition having been omitted (see p 12, *ante*), 'another Court' may now refer to a Court under the Presidency-towns Insolvency Act It should however be noted that the jurisdictions, conferred by this Act V of 1920 and Act III of 1909 are distinct and cases of one jurisdiction cannot be transferred to and dealt with by Courts under the other jurisdiction, *Sreenivassa v Official Assignee of Madras*, 38 Mad, 472 25 M L J, 299 14 M L T 184 (1913) M W N, 1004, cited at p 5 Cf *Sassoon*

v *Gosto* 31 C W N 847 in which it was held that a District Court was a Court of concurrent jurisdiction with the High Court in its insolvency jurisdiction and the latter had no power to interfere with proceedings before the former Cf *Ashutosh Ganguly v Hatson*, 53 Cal 929 44 C L J 350 A I R 1927 Cal 149 98 I C 116, *Sarat Ch Pal v Barlo v & Co*, 56 Cal 712 33 C W N 15 (F B) But these cases have been superseded by sec 18A of the Presidency Act *Vide* p 480 *infra* Each Court can stay its own proceedings, but cannot interfere with the proceedings in *another* Court, unless it has superintendence over it, see *Re Manik Chand Virchand*, 47 Bom, 275

Concurrent proceedings in and outside India Sec 77 of the Act itself suggests the possibility of concurrent proceedings in different Courts The Judicial Committee have observed in *Sasti Kinkar Banerjee v Hursookdas*, 31 C W N 1002 46 C L J 57 29 Bom L R 1179 53 M L J 114 (1927) M W N 517 A I R 1927 P C 162 104 I C 1 (P C), that a previous adjudication by a District Court does not debar the High Court from making a further adjudication So the law as it stands now makes it quite possible for different Courts to pass concurrent adjudication order against the same insolvent and this section lays down the procedure that should be followed when different proceedings are taken in different Courts There may, however, be circumstances in which it may be proper to allow the different proceedings to continue in the different Courts leaving it to them to decide ultimately which of them should annul the order of adjudication made by it in accordance with the provisions hereof, *Kedarnath v Firm of Duarka Das Badri Das*, A I R 1928 Lah 848 109 I C 648 *Vide* notes under the next heading *Annulment and stay* contemplated herein must be by the Court having seisin of the matter But, a High Court Judge sitting singly and exercising jurisdiction under the Presi-Towns-Insolv Act can order stay of proceedings in a District Court, see sec 18A of the Presidency Act Where there is concurrent adjudication by two Courts one Court cannot legally pass a conditional order of discharge without reference to the proceeding pending in the other Court, as its effect would be to discharge the insolvent from all debts provable in insolvency, *Rustomjee Dorabjee v K D Brothers* 53 Cal 866 44 C L J 454 A I R 1927 Cal 163 99 I C 736 Where there is a bankruptcy in another country, the Court here has a discretion to allow or refuse an adjudication See *Re Aranasajal Sabapathy*, 21 Bom 297, also 31 Cal 761, *supra* The object of a local adjudication, notwithstanding a previous adjudication elsewhere is to preserve the local assets, leaving, for further determination, the question in which Court such assets are to be administered, *Ibid* In this connection see also *Yokohama*

Specie Bank Ltd v Curlender & Co, 43 C L J 436 A I R 1926 Cal 898 96 I C 459, *Ex parte Mc Culloch* (1880) I R 14 Ch D 716, *Ex parte Robinson supra Re Artola* (1890) 24 Q B D 640

May Annulment under this section is in the discretion of the Court. The rule laid down here is one of convenience. So it has been held that where there is a conflict between different Courts as to jurisdiction in insolvency cases, one Court should *having regard to questions of convenience*, yield to another as it may not be just or equitable to allow proceedings in both Courts to go on concurrently. *In re William Hutton* 31 Cal, 761 8 C W N 553 Cf *Ex parte Robinson*, (1883) 22 Ch D 816 *Re Artola*, (1890) 24 Q B D 640. But that does not mean that a previous adjudication order by another Court (say of Madras) will oust the jurisdiction of the Court (say of Bombay) to adjudicate the insolvent over again at the instance of a local creditor. *Re Arana, ayal*, 21 Bom, 797 referred to in 31 Cal 761, *supra*

Who is to apply The section is silent as to who is to move the Court hereunder. It seems from the language of the section that both the creditor and the debtor can move for annulment under this section. It seems that the Court can act even *suo motu* provided the two conditions as to *pendency* and *convenience* are established by proof.

37 [§ 42 (2) & (3)] (1) Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done by the Court or receiver, shall be valid but subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may by order in writing, declare.

(2) Notice of every order annulling an adjudication shall be published in the local official Gazette and in such other manner as may be prescribed.

Principle of the Section This is section 47 (2) and (3) of Act III of 1907 and corresponds to sec 29 (2) of the Bankruptcy Act, 1914. It validates all the acts done by the Court or the Receiver before the annulment of the adjudication.

order. But for this section, there would have been some room for the contention that an annulment order would have the effect of restoring the *status quo* of the parties affected by the insolvency proceedings. After the commencement of the insolvency proceedings, the Court or the Receiver may take various actions, may collect the assets of the insolvent and may distribute them among the creditors, so if a subsequent annulment be taken as invalidating all these interim proceedings considerable confusion, nay much hardship, may result. All these considerations have necessitated the provision herein made. Now the position is that subject to the conditions of this section or the conditions imposed by the Court, a debtor whose bankruptcy is set aside is remitted to his original condition, read the observations of Cockburn C J in *Baily v Johnson* L R 7 Ex 263. Cf *Ramasami v Murugesu*, 20 Mad, 452, followed in 27 Mad, 13 M L J 372. An annulment of adjudication under this section will not, however, have the effect of invalidating or prejudicing the acts previously done by the Receiver or the Court, *Mannulal v Nalin Kumar*, *infra*. Rejection of proof is an act done within the meaning of the section and therefore such rejection will bar a

Annulment does not revive a rejected claim claim for the debt after annulment inasmuch as the rejection survives or operates even after annulment. *Brandon v Mc Henry* (1891) 1 Q B 538. Cf (1895) 1 Q B 553. A suit instituted by the Receiver in respect of the insolvent estate does not become infructuous by reason of annulment of adjudication *pendente lite* *Mannulal v Nalin Kumar* 41 All 200 16 A L J 938 48 I C 443, (distinguished in 3 Rang 201, *infra* so a proceeding started under s 54 by the Receiver may be continued notwithstanding the annulment of adjudication, *Jethaji Peraji Firm v Krishnayya* 52 Mad 648 29 L W 649 (1929) M W N 489 57 M L J 116. The word 'acts' is wide enough to include Receiver's act of avoidance under s 54. So it has been said that an annulment of adjudication does not *ipso facto* in all cases put an end to the insolvency proceedings, *Ponnusami Chettiar v Kalia Perumal Naicker* A I R 1929 Mad 480 113 I C 550. The section also enables the Court to prevent the immediate return of the property to the insolvent as a result of the annulment and to sequester it for the ultimate benefit of the creditors. When an adjudication is annulled the Court should with a view to protect the creditors, pass an order under this section vesting the property in a person appointed by it, *Roop Narain v King & Co* A I R 1926 Lah 370 94 I C 234. *Shoidan Lachmi Narain v Bahadur Chand* A I R 1927 Lah 914 100 I C 137. Cf *Motharam Daulatram v Pahlajrai Gopaldas* 19 S L R 286 A I R 1925 Sind 159 80 I C 141, *Chinnaswamy Pillai, In re*,

(1929) M W N 809, also *Maung Hme v U Po Seik*, 3 Rang 201 A I R 1925 Rang 301 86 I C 324 Though the annulment of insolvency puts an end to the insolvency proceedings against the insolvent, the Insolvency Court still retains sufficient control over the insolvent's estate, under this section the Court has ample jurisdiction to appoint a person and to vest the insolvent's property in him, see *Somasundaram v Peria Karuppan*, 58 M L J 658 31 L W 546 But where no appointment is made and no condition is imposed, the property reverts to the insolvent unconditionally, 3 Rang 201, *supra* And in respect of the property still in the hands of the Receiver there will be a resulting trust for the benefit of the insolvent, (1921) 1 K B 488 (*infra*), see also *Arunagiri Mudaliar v Official Receiver*, *infra* "An order vesting the property in some person other than the bankrupt may be necessary for the purpose of securing or bringing about the fulfilment of any condition on which the annulment is based", *Flower v Lymeregis Corporation* (1921) 1 K B 488 Under the English law when the debtor takes back the property it is subject to the equities which existed against the Receiver, *Mackintosh v Hardingham*, 15 Ch D 387

If any part of the assets be lost by any of the acts aforesaid, there is no help, but the insolvent will have a right in the reversion, and the surplus or residue after deducting the Receiver's costs will revert in the debtor, *Mulchand v Rajdhar*, 73 A L J 975 A I R 1925 All 735 88 I C 544, and where such surplus is in the hand of a Receiver he should hold the same for the insolvent debtor's benefit, *Arunagiri v Official Receiver*, (1926) M W N 950 98 I C 1060

Where, subsequent to the institution of a suit by the Receiver against the partners of the insolvent in respect of their alleged liability to the latter, the adjudication order was annulled, *held* that the suit did not abate on the insolvency being annulled, but might be carried on by the insolvent himself, if not by the Receiver, *Mannulal v Nelin Kumar*, 41 All 200 16 A L J 938 48 I C 443 Where the sole plaintiff in a suit being adjudicated insolvent and Receiver not being on the record, the suit was dismissed it could be restored upon annulment of his adjudication, *Kissen Gopal v Suklal Karnani*, 53 Cal 844

Notwithstanding the annulment, the compositions or schemes of arrangement remain as they were under the bankruptcy, *West v Baker*, 1 Ex D 44, *Ex parte Lennard*, 1 Ch D 177

Vest A regular vesting order should be made, the effect of which will be to divest the Receiver in whom the property vested under sec 28 (2) The word "person" shows that he may be a person other than the Receiver, i.e., a stranger or a

third party, such person is not necessarily a *receiver* in the sense, in which that term has been used in this Act and the provisions of secs 56 and 59 will not apply to him, although he is charged with the ordinary obligations of a trustee *Comp A B Miller v Abinash Chunder*, 4 C W N 785, *Motharam v Pahlajrai*, 50 I C 141 (Sind). The object of vesting the property in a stranger is to place it beyond the clutches of the insolvent, and to render it available for distribution among the creditors. A person in whom the property of an insolvent is vested hereunder has power to sell the property and distribute it amongst the creditors, *Bag Ram v Chanan Mal*, 10 Lah L J 180 A I R 1928 Lah 453 108 I C 603

Position of the Receiver on Annulment An annulment does not necessarily relieve the receiver of all his duties, *vide* above. Where the annulment is *unconditional*, the property goes back to the debtor, and the receiver's proceeding under sec 53 becomes infructuous, see *Maung Hme v U Po Seik*, 3 Rang 201 (*supra*), see also *Shoidan Lachmi Narain's* case above. But according to the Madras High Court a proceeding under s 54 may be continued notwithstanding the annulment, 52 Mad 648, *supra*. So it would not be proper for a Court to make an *unconditional* order of annulment without previous notice to the receiver, see *S V A R Firm v Maung Pau*, 6 Bur L J 44 A I R 1927 Rang 173 101 I C 589. As to the receiver's costs and the surplus in his hands, see 23 A L J 975 and 98 I C 1060, *supra*. As to suit instituted by the Receiver, see 41 All 200, *supra*.

Sub-sec. (2) Notice of the order of annulment must be published in the local Official Gazette and also in such other manner as may be prescribed.

Question of Limitation in relation to annulment If the receiver allows a claim to get time-barred because of his omission to enforce it, the claim is not revived or disentangled from limitation on annulment, *Markwick v Hardingham*, 15 Ch D 339.

Appeal An appeal from an order declaring the conditions on which the debtor's property shall revert to him on annulment of adjudication lies to the High Court, see Sec 75 (2) and Schedule I. See also *Shoidan Lachmi Narain v Bahadur Chand*, A I R 1927 Lah 914 100 I C 137.

Compositions and schemes of arrangement

38. [§ 27 (1), (2), (3), (4), (5)] (1) Where a debtor, after the making of an order of adjudication, submits a proposal for a composition in

Compositions and
schemes of arrangement

satisfaction of his debts or a proposal for a scheme of arrangement of his affairs, the Court shall fix a date for the consideration of the proposal, and shall issue a notice to all creditors in such manner as may be prescribed

(2) If, on the consideration of the proposal, a majority in number and three fourths in value of all the creditors whose debts are proved and who are present in person or by pleader, resolve to accept the proposal the same shall be deemed to be duly accepted by the creditors

(3) The debtor may at the meeting amend the terms of his proposal if the amendment is in the opinion of the Court calculated to benefit the general body of creditors

(4) Where the Court is of opinion, after hearing the report of the receiver, if a receiver has been appointed and after considering any objections which may be made by or on behalf of any creditor, that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the Court shall refuse to approve the proposal

(5) If any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge the Court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than six annas in the rupee on all the unsecured debts provable against the debtor's estate

(6) [§ 27 (9)] No composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent

(7) [§ 27 (6)] In any other case the Court may either approve or refuse to approve the proposal

This is sec 2 (1) (2) (3) (4) (5) (9) & (6) of the Act of 190 Compare this section with sec 16 of the Eng Bankruptcy Act 1914 It does not contemplate enquiry into the debts by the Receiver instead of by the Court *Re Assomal* 4 S L R 222 9 I C - 4

This section lays down the procedure which the Court is to follow when a debtor *after the making* of an adjudication order submits a proposal for Composition in satisfaction of his debts As to whether the representatives of a deceased debtor have *locus standi* to submit a proposal for composition see *Sripat Singh v Prodyat Kumar* 48 Cal 87 57 I C 810 A composition is an agreement between the debtor and his creditors by which the latter agree to accept smaller amounts in full satisfaction of their claims *Re Hutton* 18 2) 7 Ch App 723 The duty of the Court on receiving the scheme is to lay it before the creditors after issuing the necessary notices to them The next step is to ascertain their views at a meeting convened under the provisions of the section If a majority in number and three fourths in value of all the creditors whose debts are proved and who are present in person or by pleader resolve to accept the proposal the Court should note down that the proposal is duly accepted by the creditors But if on a consideration of the proposal there is not a majority in number and three fourths in value of all the creditors whose debts are proved and who are present in person or by pleader in favour of the acceptance of the scheme the proposal will stand rejected whatever be the opinion of the Court as to its merits When the scheme has been duly accepted by the creditors it is the duty of the Court to consider whether it shall or shall not approve the proposal The fact that the proposal is approved by the creditors does not involve its approval by the Court *Shafiq u Zaman v Deputy Commissioners* 30 I C 694 s c 18 O C 125 The procedure of this section must be strictly followed otherwise the arrangement will not be binding upon the creditors and will not operate as a *legal* composition *Mulammad Asadullah v Sant Rani* 1 Lah 247 A I R 19 6 Lah 87 89 I C 740 Cf *Brijkishore Lal v Official Assignee Madras* 43 Mad 71 37 M L J 244 (1919) M W N 795 There can never be a scheme against the wishes of a debtor because the very essence of a scheme is that it originates with a proposal emanating from the debtor himself Cf *Ex parte In re Clark* (1884) 13 Q B D 426 (432) The binding force of a *composition* is derived not from the assent of the creditors but from the Court's approval under the authority of this section *Khalil ul Rahman v Ram Sarup* 8 L L J 286 A I R 1926 Lah 489 95 I C 204 So a mere representation to the Court that a certain scheme has been accepted by the creditors out of Court will not be recognised

in bankruptcy proceedings *Behari Lal v Harsubdas* 25 C W N 137 61 I C 904 An arrangement for Composition out of full discharge on payment of 4 as in Court the rupee without compliance with the prescribed procedure is no composition, see *Brij Kishore Lal's case supra* The Court has a duty to protect the creditors against themselves and can therefore veto a proposal assented to by the creditors *In re Burr*, (1892) 2 Q B 467 (472), *Ex parte Campbell*, (1883) 15 Q B D 213. The composition is not binding upon the creditors not included in the schedule see *Khalil ul Rahman's case* See also 87 I C 348, cited at p 252 *post* Note that the section simply uses the word "debts" and not "proved debts or debts entered in the schedule" Cf *Muhammad Ibrahim v Ram Chandra*, 48 All 272 24 A L J 244 (47) 92 I C 514 An insolvent debtor cannot make any payment to his creditors behind the back of the Official Receiver, *Re Subramanian Chetty & Sons*, (1906) M W N 784 In the case of composition with the principal debtor with the approval of the Court, the surety is not thereby discharged *Bombay Co Ltd v Official Assignee*, 44 Mad, 381 (1921) M W N 281 20 M L J 404 63 I C 172 As to the effect of an assignment by the debtor by means of a trust deed for the benefit of his creditors see *Lal Chand v Hussainio Mamo*, A I R 1926 Sind, 78 97 I C 257 It should be noticed that the scheme of the section is to make a distinction between a composition and a scheme of arrangement Cf (1883) 25 Ch D 266

Sub-sec. (1) : After the making In the Act of 1907 we had the following words, "Whether before or after the making of an order etc" Whereas in the present Act we have 'After the making of an order etc' The word "before" has been omitted so the composition or the scheme cannot at all be submitted before the adjudication order, "It is very doubtful whether under the Prov. Insolvency Act the Court would have before it the necessary facts to justify it in dealing with compositions or schemes prior to adjudication It is therefore proposed to follow in this respect the procedure under the Presidency towns Insolvency Act and allow compositions and schemes only after adjudication" (*Notes on Changes*)

Even under the old Act notwithstanding the word "before" composition before adjudication was held to have been an impossibility, *Fleming Sham v Sadiram*, 9 S L R 181 2 I C 565 Likewise, it has been said that the question of approving composition can arise only after adjudication, *Re Assomal*, 4 S L R 222 9 I C 224 Cf *Ex parte Rogers*, (1884) 13 Q B D 458 See "Change of Law" under sec 33 at p 215, ante

Composition deed —It denotes a transaction entered into by a debtor or insolvent, in embarrassed circumstances, with his creditors with the object of paying the latter a composition upon their claims *Mukchand v Nanilal* 28 Bom 364 It is not equivalent to a conveyance or to trust deed though a trustee is appointed by the debtor with the consent of the creditors (*Ibid*) A composition deed for the benefit of all the creditors not comprising the whole of the property of the judgment debtor is not void if the transaction is fair and *bonafide* and takes place in the ordinary course of business or upon the pressure of the creditors It does not become void by the circumstances that it is signed by some only of the creditors and that among them are some whose debts are barred by limitation It is not invalidated by the subsequent striking off the insolvency petition *Kothandarama v Murugesam*, 7 Mad 72 13 M L J 2 Some side-light may be obtained regarding this matter from *Mamindra Chandra v Lal Mohan* 56 Cal 940 49 C L J 112 AIR 1929 Cal 358 If the composition becomes invalid by reason of want of notice on a creditor the latter is not debarred from attaching his debtors properties *Muhammad Isadullah v Sant Ram* 1 Lah 249 AIR 1946 Lah 8 89 I C 40 *supra*

Notice When the debtor has submitted his proposal under sub sec (1) the Court shall fix a date for consideration of the proposal and shall issue a notice to all the creditors of the insolvent This notice shall be served in such manner as may be prescribed Under the Act of 1907 such a notice had to be published in the local official Gazette but that provision has been removed from the present section When the requisite notice is not given to all the creditors the composition becomes invalid *Muhammad Asadullah v Sant Ram supra* Cf *Shafiq u Raman v Deputy Commissioners* 18 O C 175 30 I C 694

Fix a date From the language of sub sec (2) it seems that the date has to be fixed some time after the creditors have proved their debts

Sub-sec (2) This sub section and the next one indicate that there should be a creditors meeting for the consideration of the proposal submitted by the insolvent If the creditors accept the proposal they should pass a resolution to that effect, and thereafter the same shall be deemed to be duly accepted by the creditors within the purview of this section No creditor is entitled to vote whose debt has not been proved and whose name has not been admitted on the schedule by the Judge, *Clandan Lal v Khemraj* 15 A L J 156 40 I C 156 This is so because the composition is not founded on the total amount of debts provable but only on the debts actually proved in bankruptcy Cf *Re E A B* (1902) 1 K B 457 Where

a receiving order is made against a partner any creditor to whom that partner is indebted jointly with the other partners or any one of them may prove his debt for the purpose of voting at any meeting of creditors *Damodar Das v Official Receiver* 11 IC 145

The creditors who pass the resolution should (a) form a majority in number and (b) hold three fourths of the total amount of debts proved *Proof of debts* means that the creditor shall have proved his debt in some of the ways prescribed in sec 3 and his name shall have been put by the Court on the schedule of creditors *Chandan Lal v Khemraj* 40 IC 156 15 ALJ 156 Both the above requirements should be satisfied otherwise there will be no scope for the application of this sub-section The creditors should be present in the meeting either 1 person or by 1 reader Acceptance of the proposal by the creditor does not necessarily mean that the Court shall approve it If there is no majority in favour of the proposal it will stand rejected whatever be the opinion of the Court on the merits *Shafiq v Deputy Commissioners of Barabanki* 18 OC 150 10 IC 694 No composition or scheme can be approved by the Court unless the requirements of sub-section (b) are fulfilled

Sub sec (3) The debtor can propose amendment of the terms of his original proposal provided the Court considers it beneficial to the general body of creditors So before such amendment a decision from the Court as to its beneficial character has to be obtained If the amendment does not turn out to be so beneficial in the long run that will not have the effect of nullifying the amendment if it is *calculated to benefit* at the time when it is before the Court for consideration

Sub sec. (4) (5) and (6) These sub-sections lay down in which cases the Court shall refuse to approve the debtor's proposal

The Court shall refuse such approval—

i) If the Court after hearing the report of the receiver (if any) and after hearing the objections of the creditors does not consider the debtor's proposal beneficial to the creditors (Sub sec 4) *Cf Ex parte Campbell* 15 QBD 215

ii) If such facts are proved as will lead the Court either to refuse or suspend or attach conditions to the debtor's discharge provided the debtor's proposal does not provide reasonable security for payment of not less than six annas in the rupee on the total amount of the unsecured debts (Sub sec 5)

(iii) No compromise or scheme shall be approved by the Court which does not provide for payment of the debts in the order in which they are directed to be paid (Sub-sec 6)

In sanctioning a composition under sub sec (6) of this section a Court has a discretion in exercise whereof it should examine whether the composition is reasonable and well calculated to benefit the general body of creditors. The majority of the creditors may support the composition but that is not conclusive and the Court may have to use its discretion to protect the creditors against themselves. In using its discretion under this sub-section the Court should act in the interests of commercial morality, *Fleming Shai v Sadiram*, 32 IC 565, see also SLR 181. The Court should enquire whether the scheme is or is not reasonable and whether it is or is not calculated to benefit the creditors. In *re Bischoff Shelm* (1887) 19 QBD 11, a composition against the commercial or public morality will be refused, *Ex parte Campbell*, 15 QBD 213. Consent of all the creditors is not by itself necessarily sufficient to justify an order of annulment, *Motilal v Ganpatram* 23 CLJ 220 21 CWN 936 34 IC 792. If the composition or scheme is manifestly the best thing for the creditors the Court will approve it, *Ex parte Kearsley*, 18 QBD 168, *Re Fleu* (1905) 1 KB 28. The Court will not refuse

Refusal for misconduct of debtor

approval to a composition, which is

otherwise good simply because of slight acts of misconduct on the part of the debtor. *Re E & B* 1902) 1 KB 457. Misconduct, unless flagrantly against public policy will not justify the Court's refusal to approve a proposal, see *Re Burr*, (1892) 2 QB 467, also *Re Gense*, 1 QBD 168, *Re Bottomley* 10 Morr 262. If the Court does not consider a proposal fit to be approved he need not approve it, *Ganga Sahai v Mukaram* 11, 24 All 441 (451) AIR (1926) All 361 97 IC 556. The proposal approved by the Court must be exactly that accepted by the creditors.

For cases, in which the Court must refuse an absolute discharge, see sec 42 read with sec 41 (2), cl (a). As to suspending or attaching conditions to the order of discharge see sec 41 (2), clauses (b) and (c).

Sub-sec (7) In any other case (that is not heretofore provided for) the Court may either approve or refuse to approve the proposal. The Act here gives the Court a discretion which should be very carefully exercised in the interests of the commercial morality of the country. Thus, for instance where the insolvent makes payments to some of his creditors behind the back of the Receiver the Court will be justified in refusing sanction to the composition. *Re Subramaniam Chetty* (1926) MWN 784 AIR 1926 Mad 1166 24 LW 638. The approval of the Court required by the section is not an idle formality, it provides a safeguard against imprudent as well as

Cf *Re Fleming Shait*, 9 S L R 181 32 I C 565 Ordinarily approval of a proposal should be made by means of a formal order, but there may be circumstances to signify an approval by implication though no formal order has been made in that behalf *Ganga Sahai v Mukarram Ali* 24 A L J 441 A I R 1926 All 361 97 I C 556

Secured Creditor A secured creditor is not affected by a composition unless he consents to it, *Jugmohan v Indra Chandra* 63 I C 895 (Cal) 59 I C 95

Appeal This section finds no mention in Sch I, therefore there is no appeal to the High Court as a matter of right, so previous leave has to be obtained for an appeal from an order under this section *Ganga Sahai v Mukarram Ali* 24 A L J 441 9 I C 556 A I R 1926 All 361 For an appeal against the order of approval or refusal see 18 O C 125 30 I C 694

39. [§ 27 (7)] If the Court approves the proposal, the terms shall be embodied in an order of the Court and the Court shall frame a schedule in accordance with the provisions of section 33, the order of adjudication shall be annulled, *and the provisions of section 37 shall apply*, and the composition or scheme shall be binding on all the creditors entered in the said schedule so far as relates to any debts entered therein

This is sec 27 () of the Act of 1907 Compare it with sec 16 (1) (13) of the English Bankruptcy Act 1914

Consequences flowing from Composition When the Court approves the proposal it shall embody the terms thereof in an order of the Court and shall frame a schedule in accordance with the provisions of sec 33 and shall annul the order of adjudication and thereafter the validating provisions of sec 3 shall apply. *vide* notes and cases under that section Cf *Ganga Sahai v Mukarram Ali* 24 A L J 441 9 I C 556 If no condition is attached the insolvent regains his normal powers and the receiver cannot any more carry on the proceedings initiated by him *Official Assignee v Narayana Goundan*, A I R 1926 Mad 113 60 I C 67 When a composition

resolution is approved it follows as a necessary implication that the debtor will have power to deal with his estate so as to be able to pay the composition money *Ex parte Allard*, 16 Ch D 505

By saying that the provisions of s 37 shall apply, the Legisla

ture must have meant that instead of permitting return of the property to the insolvent the Court might have retained control over the property for the purpose of carrying out the scheme of composition *Ex parte Moon*, (1885) 19 Q B D 669. It is evident that any surplus remaining after satisfaction of the composition would belong to the debtor, *Flower v Mayor of I R Corpn* (1921) 1 K B 448.

It should be noticed that the section requires the Court to embody the terms of a composition in an order and annul the order of adjudication *Goind v Sonba* 11 IC 663. Though the section says that *the terms shall be embodied* in an order of the Court still it seems that an omission to do so will not vitiate the Court's approval of the terms or consequent annulment of adjudication *Bombay Co Ltd v Official Assignee* 44 Mad 381 (1921) M W N 281 40 M L J 404 63 IC 172. Ordinarily an annulment of adjudication under this section upon approval of a scheme of composition does not put an end to the insolvency proceedings though the debtor's insolvency has thereby come to an end [Cf *Ex parte Clark* (1884) 13 Q B D 46]. A creditor entered in the insolvency schedule may prove his debt even after the annulment of the adjudication under this section and the insolvency Court has jurisdiction to enforce any payment it may order to be made to such creditor under the scheme of composition even after the annulment *Kanureddi Timappa v Devasi Harpal* (1929) M W N 27 56 M L J 458 9 L W 2 AIR 1929 Mad 157 115 IC 815 *Ponnusami Chettiar v Kaha Perunal Naicker* AIR 1929 Mad 480 113 IC 550. Not only does the jurisdiction of the Court continue even after the approval of composition even the insolvent will have a *locus standi* to move the Court for reduction of a proof *Ex parte Bacon* (1881) 11 Ch D 44. On an annulment of adjudication because of the debtor composing with his creditors the petitioning creditor does not become liable to pay the costs of the Official Receiver *Arjan Das v Fa il* AIR 1929 Lah 89 110 IC 305. When a third person stands surety for payment of dividends in accordance with a composition on which an annulment of adjudication is based such surety is bound to pay the dividend claimed by an after coming creditor proving his debt after annulment, *ibid*. The order cancelling adjudication under this section is quite distinct from an order of discharge under sec 44 (2) *Ram Sarup v Shetkh Khalil ul Rahman* *infra*. Also *Khalil ul Rahman v Ram Sarup* 8 L L J 286 2 Punj L R 588 AIR 1926 Lah 480 95 IC 204. The grant of permission to an insolvent to mortgage his property to one of his creditors and the subsequent filing of the proceedings

owing to the absence of the parties will not amount to an order annulling the adjudication under this section, *Gorind v Sonba, supra*. The composition or scheme will be binding on all the creditors mentioned in the schedule framed under this section to the extent of the debts entered herein. *Vide infra*, 7 Lah L J 158. A creditor, who does not choose to take advantage of the composition and to prove his debt for participation in the funds made available under the composition, is not bound to do so. He may take his chance and recover what he can in due course of law, *Khalil ul Rahman v Ram Sarup, supra*. As to when the Court should or should not approve the proposal see the notes under the preceding section.

Change of law The words "and the provisions of section 37 shall apply," are new, and for the effect of this provision *vide* under that section, also 19 Q B D 669, *supra*.

Shall be binding That is, thereafter the creditors will *not be entitled to enforce any further claim whether by action or otherwise*, see *Ex parte Milner Re Milner*, (1885) 15 Q B D 605, *Re E A B* (1902) 1 K B 457.

The composition or scheme is binding only on the creditors entered in the schedule, and not on the unscheduled ones, *Ram Sarup v Sheikh Khalilul*, 26 Punj L R 117, 7 Lah L J 158 AIR 1925 Lah 376 87 IC 348, *Menghaj v Virbhandas* 17 SLR 300 AIR 1924 Sind 122 76 IC 250, *Khalil ul Rahman v Ram Sarup, supra*. So an unscheduled creditor is at liberty to execute his decree, 7 Lah L J 158 87 IC 348 (*supra*), on appeal—8 L L J 286 AIR 1926 Lah 489 95 IC 204. Even the holder of a mortgage-decree, if he is a consenting party to a composition sanctioned by the Court, will be incompetent to go behind it unless the proceedings of the insolvency Court are set aside, *Jugmohan v Indra Chandra* 59 IC 95 63 IC 895 (Cal). A creditor whose name appears on the schedule is bound by the scheme, although he has not received any benefit under it, *Seaton v Deerhurst* (1895) 1 Q B 853. A creditor bound by the composition can not pursue any other remedy than that provided for in s 40, below, *In re Hardy*, (1886) 1 Ch 904.

Effect of composition with insolvent father in case of joint decree against father and son After a decree for money was obtained jointly against father and son, the father was adjudicated an insolvent and he compounded the claim under the decree with the decree-holder and thereafter the son is liable to the decree holder only for such portion of the decretal amount as has not already been realised by the decree-holder in pursuance of the composition, *Amolak Chand v Bhagvan Das*, AIR 1927 All S-o 102 IC 193 (2).

40 [§ 27 (8)] If default is made in the payment of any instalment due in pursuance of the composition or scheme or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay or that the approval of the Court was obtained by fraud the Court may if it thinks fit *re adjudge* the debtor insolvent and annul the composition or scheme but without prejudice to the validity of any transfer or payment duly made or of anything duly done under or in pursuance of the composition or scheme. When a debtor is *re adjudged* insolvent under this section all debts provable in other respects which have been contracted before the date of such *re adjudication* shall be provable in the insolvency.

Power to re-adjudge
debtor insolvent

This is old sec 2 (8) and corresponds to sec 16 (6) of the Bankruptcy Act 1914. It provides for the annulment of the composition or the scheme and the re adjudication of the insolvent on the following grounds

- (i) if default is made in the payment of any instalment due in pursuance of the composition or scheme [Cf *Re Croom* (1891) 1 Ch 695] or
- (ii) if the composition or scheme cannot proceed without injustice or undue delay
- (iii) if the approval of the Court was obtained by fraud

Except in the last case (that is in the case of fraud) the Court will not exercise the power of re adjudging the debtor insolvent if it can see plainly that the creditors can gain nothing by it but will do so if there is a probability of gain. *Ex parte Moor* (1881) 19 Q B D 669. If the creditors are induced by false and fraudulent misrepresentations of the insolvent to accept a composition the transaction will be invalid and the creditors will be entitled to prove their claim. *Belary Lal v Harshukhdas* 25 C W N 13 61 IC 904.

Effect of the annulment of composition When the composition or scheme is annulled under this section the insolvent's property forthwith vests in the Official Receiver if there be no direction by the Court to the contrary. *Re Mc Henry Ex parte Mc Dermott* (1888) 1 Q B D 580. After such annulment the creditor can prove for their original debts and not simply for what would have been due under the com

position, *Ex parte Gilbey*, 8 Ch D 248. The annulment will also discharge a surety for the composition from liability, *Ilalton v Cook* (1888) 40 Ch D 325. Note that there is a validating clause in this section, by virtue of which all intermediate acts before the annulment of the composition or scheme will stand good. Cf *In re Herdy*, (1896) 1 Ch 904.

When a debtor is re-adjudged an insolvent under this section all debts contracted before the date of re-adjudication can be proved if they are provable within the meaning of section 34.

Discharge

41. [§44 (1), (2)] (1) A debtor may, at any time after the order of adjudication, *and shall, within the period specified by the Court,* apply to the Court for an order of discharge, and the Court shall fix a day, notice whereof shall be given in such manner as may be prescribed, for hearing such application, and any objections which may be made thereto.

(2) Subject to the provisions of this section, the Court may, after considering the objections of any creditor and where a receiver has been appointed, the report of the receiver—

- (a) grant or refuse an absolute order of discharge, or
- (b) suspend the operation of the order for a specified time, or
- (c) grant an order of discharge subject to any conditions with respect to any earnings or income which may after ~~wards~~ *become due to the insolvent*, or with respect to his after-acquired property.

This is sec 44 (1) & (2) of the repealed Act. Compare it with sec 26 (2) of the Bankruptcy Act, 1914.

The Section This section and the next one lay down the limitation within which the Court should or should not hedge in the order of discharge. It further imposes a duty on the Court to take into account certain circumstances at the

time of making such an order. "The over-riding intention of the Legislature in all Insolvency Acts is that the debtor on giving up the whole of his property shall be a free man again, able to earn his livelihood and having the ordinary inducements to industry. Sometimes, it is not right that the insolvent should be free immediately, he must pass through a period of probation and theoretically there may be cases in which he ought not to be free at all, but *prima facie* he has to give up everything of his and on doing that he is to be a free man." per Vaughan Williams L J *Re Gaskell*, (1904) 2 K B 478 (482) 73 L J K B 656, quoted in *Sitaram v Redden*, A I R 1926 Cal 529 91 I C 760 and *Mulchand v Official Receiver*, [1930] A L J 316 124 I C 410. Under sub sec (2) the Court has the power to unconditionally refuse a discharge and that the only remedy of the insolvent is to present further applications for discharge at any later time. *Clayuda Nadar v Subramania Pillai*, (1928) M W N 175 A I R 1928 Mad 609 109 I C 610. But read the observations of Mukerji, J in *Mulchand v Official Receiver*, *supra*. Where on an application for discharge, the Court in consideration of the fact that not even one anna in the rupee had been paid although the application had a large business and that the conduct of the bankrupt was reproachable in many respects rejected the same, the High Court held that the lower Court's order was not satisfactory because it did not state that the Court was only refusing an absolute order of discharge and not purport to have considered the advisability of granting a conditional discharge or of suspending the operation of the order for a specified time, *Mul Chand's case*, *supra*. Reading the section as a whole, it will be noticed that the Act does not make a discharge a matter of right but only a matter of discretion, Cf (1887) 19 Q B D 182, such discretion cannot readily be interfered with on appeal, (1886) 3 Mor 228, though it can be varied for good reason, *Ex parte Castle Mail Packet Co* (1886) 18 Q B D 154.

Change of Law Under the Act of 1907, the insolvent could apply for discharge at any time after the order of adjudication, but under the present Act, the insolvent is to apply for discharge at any time after the order of adjudication and within the period specified by the Court. Besides, the old Act did not impose any duty on the insolvent to make an application for discharge at all, as that Act used the word *may*, but in the present Act we have the word *shall*, which makes it obligatory for an insolvent to apply for discharge within the specified time. The breach of the duty indicated by the word "shall" involves the consequences pointed out in sec 43, *infra*, *Ram Krishna*, *Ex parte*, 4 Pat 51 A I R 1925 Pat 355, see also *Amjad Ali v Mohammad Ali*, 4 C

W N 993 A I R 1927 Oudh, 506 105 I C 912 So under the old Act a person could remain an undischarged insolvent for ever But this is not permissible under the present Act, because if he does not apply for discharge within the time limit fixed by the Court his adjudication is liable to be annulled under sec 43 This is the most vital change effected by this new enactment in the position of an insolvent Cf the most emphatic condemnation of the old system by Sir George Lowndes in his speech while introducing the Bill "The main defect in the old Act Etc Etc", quoted at p 92, *ante* Of course, within the specified time as fixed by the Court, the insolvent has complete discretion to apply for discharge when he likes, i e *at any time*, *Amjad Ali v Moham mad Ali, supra*

Procedure for discharge After the insolvent has made an application for discharge within the time specified in the adjudication order or within such extended time as is granted him by the Court under sec 27 (2), the Court shall

fix a date for the hearing of the said application and shall cause notice of such date to be served in the prescribed manner and then shall hear the objections (if any) against the application and shall also hear the report of the Receiver, and thereafter shall make one or other of the orders mentioned in the clauses (a), (b) and (c) of sub section 2 of this section The Court can also put such questions to the bankrupt as it thinks fit *Ex parte Sharp* (1893) 10 Morr 114 For the *Report of the Receiver* vide notes under sec 42 (2) From the language of sec 27, it is clear that the party who can make the application for discharge is the debtor and no one else *Jethaji Piraji Firm v Krishnayya*, 57 M L J 116

An agreement between a creditor and a debtor to the effect that the former will not oppose the debtor's application for discharge is void *Naoraji v Kazi Sedick*, 20 Bom, 636, so the creditor can oppose the grant of discharge notwithstanding such agreement

Sub sec (2) Subject to the provisions etc.—that is, when the requirements of this section have been fulfilled From the use of the word 'may' it seems that the granting of an order of discharge is discretionary with the Court *Poona Iall v Kanhaya Iall* 19 Cal, 730 *Re Barker*, (1890) 25 Q B D 285 In exercising this discretion the Court will have regard not to the interests of the creditors alone, but also to the interests of the public and commercial morality, *Re Badcock, Ex parte Badcock* (1886) 3 Morr 138 Under s 41 all that the Court can do is to suspend the operation of the order for a specified time or grant an order of discharge subject to

any condition with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after acquired property, but an order stating that he shall remain a bankrupt until he pays a particular proportion in the rupee is a bad order, *Ramzan v Mela Ram*, A I R 1929 Lah 461 Comp J H Gee v Shubnarain, A I R 1929 Pat 184 118 I C 352 Before passing an order of final discharge under s 41, it is necessary for a Court to examine the insolvent and to be satisfied of certain facts which are to be found in s 42, *Gopiram Bhotica v Biraj Mohan* A I R 1929 Cal 5-6 Before making an order under this section, the Court should consider the report of the Receiver (if any), *Re an Laun* 14 Mans 281, the report ought to contain reference to the bankrupt's conduct, *Re Os ell*, 9 Mor 202, it is not however conclusive, *ibid*

Absolute order of discharge As to the circumstances under which the Court should refuse an absolute discharge, see sec 42, *post* The Court's power in that behalf is *absolute* except in so far it is fettered by the next section (s 42) Cf *Re Barker* 25 Q B D 285 An order of final discharge of an insolvent under this section cannot be made without taking into consideration the facts stated in sec 42, *infra*, *Gopiram Bhotica v Biraj Mohan* A I R 1929 Cal 576 123 I C 748 As to circumstances which disentitle a bankrupt to an absolute order of discharge see *Re Sultzberger*, 4 Morr 82, *Re Heap*, 4 Morr 314 An order *refusing* discharge does not by itself amount to an annulment of the insolvency The insolvency continues till an express order of annulment is made, 52 M L J 54 (notes)

Suspend the operation of the Order The order here obviously means the order of discharge The period of suspension should not be less than *two* years, *Re Osuall*, (1892) 9 Morr 202, inasmuch as suspension for a shorter period will scarcely be more than a nominal punishment There should be long suspensions in bad cases, *Re Suabey*, (1897) 76 L T 534 The period of suspension must be *specified* and cannot be an indefinite one, see Cl (b) of this sub section

The discretion of the Court with regard to the period of suspension under sub clause (b) or the conditions to be laid down under sub clause (c) with respect to any earnings or income which may thereafter become due to the insolvent, cannot be fettered by the provisions of sec 42 which refer only to sub-cl (a), *Debi Prosad v Allen Grant*, 39 I C 916 (All) It is incumbent upon the Court to exercise the discretion cautiously and judiciously, (*Ibid*) Before the Court makes an order of suspension there must be reasonable pros-

pects that some available funds will be forthcoming, *Re Jones* 24 Q B D 589. Also see under the heading, "Subject to the provisions etc" above. It would be unfair to suspend the discharge of an insolvent on account of an undetermined liability which might never arise and the Court is not competent to make it a condition of the discharge that the insolvent should furnish security for the amount of this liability, *Mirza Ali v Quadiri Khanam*, 21 P L R 1919 50 I C 774. There can be no suspension of discharge to extort more than 1/-/8/- as in the rupee. Cf *Re Kutner*, (1921) 3 K B 93. A discharge suspended for a period automatically works out after the expiry of that period, without any further order of the Court, *ibid* at p 101 (of the report), see also *Bousfield v Dove*, (1884) 27 Ch D 68-

Discharge does not put an end to Court's power to give directions as to distribution of assets. An order of discharge does not put an end to the bankruptcy proceedings nor does it put an end to the Court's power to give directions as to the distribution of the assets. Therefore where a secured creditor's rights were ignored by mistake and the proceeds of sale of the insolvent's property were distributed among the creditors the Court can, notwithstanding the discharge give directions at the instance of the mortgagee for satisfaction of the mortgage claim, *K P S P P L Firm v C A P C Firm* 7 Rang 126 A I R 1929 Rang 168 117 I C 582. Cf however *Jilani Mamoon v Ghulam Husain*, 12 S L R 20 47 I C 771.

Effect of Refusal of Discharge on Petition for protection. Every application for protection after refusal or suspension of discharge must be judged on its merits. If the insolvent has acted recklessly and dishonestly the fact that he cannot pay is no reason for depriving the creditor of the power of punishing him by attachment and imprisonment to the extent the law allows. A protection order is a privilege to be granted or withheld as the Court in its discretion may determine. Where the Court finds that the insolvency is of a flagrantly culpable kind, being the result of gross extravagance accompanied by grave malpractices, and a total disregard of the creditors whose money was squandered, protection should be refused, *Mahomed Hapi v Sh Abdul Rahman*, 40 Bom 461.

Pendency of case not terminated by refusal of Discharge. The refusal of discharge to an insolvent is not necessarily a determination of the insolvency proceedings. Cf *Rose & Co Ltd v Tan Thean Tark* 2 Rang 643 A I R 1925 Rang 105 84 I C 909.

Discharge subject to conditions This section gives the Court a discretion similar to the discretion given in the Eng Act to impose conditions for the payment of the balance of the liabilities which will bind the insolvent to the discharge, *Nand Lal v Girdhari Lal*, 5 O W N 347 (1928) Oudh, 263 109 IC 633 (2) The Court can impose conditions as to future earnings hereunder while making an order of discharge, *Jamanadas v Vinayak*, 7 N L R 101 IC 69S Cf *Siba Subramania v Thetheppa*, 47 Mad 45 M L J 166 (1923) M W N 895 75 IC 572, in the insolvent was directed to place his after acquired property at the disposal of the Court subject to a reservation of 25/- per month for his own maintenance as well as that of his family. The Subordinate Courts should try to profit by this example. The Court has a discretion as to the conditions to be imposed, 39 IC 916, *supra*. When there is a reasonable chance of the insolvent acquiring new property (e.g. as a legacy), the discharge should be made conditional on his giving some satisfaction to his creditors out of that property, comp *In re Jones*, (1890) 24 Q B D 589 (594). The order of discharge subject to conditions cannot be made unless there is some reasonable probability of the insolvent coming into possession of funds, see *Re James* (1891) 8 Morrell, 19. The condition as to future earnings or after acquired property serves a two fold purpose, it gives something to the creditors and at the same time it tests whether there is an honest intention in the insolvent to discharge his debts to the best of his ability, *Poona Lall v Kanahaya Lall* 19 Cal 730. No such condition should, however, be imposed on the bankrupt as would cripple his power of earning, see *In re Jones*, (1890) 24 Q B D 589 (594), *In re John Roberts & Co*, (1904) 2 K B 299 (304). In the case of a conditional order of discharge, the discharge takes effect as soon as the condition is fulfilled, see *In re Hackins*, (1892) 1 Q B 890.

The entry of judgment against an insolvent in respect of assets provable under the Act will not be made a condition of discharge unless the insolvent has an income more than sufficient to keep his family in the enjoyment of the ordinary necessities of life, *Ibdul Karim v Official Assignee*, 28 Mad 16S.

A B—The powers of suspending, and of attaching conditions to an insolvent's discharge may be exercised concurrently see sec 42 (3). If a condition was improperly annexed it may be ignored as a nullity, see *Kallu Kutti Parambath v Puthen Peetikakkal*, 22 L W 542 49 M L J 595 AIR 1926 Mad 123 91 IC 144, *Ram Chandra v Shama Charan*, 18 C W N 1052 19 C L J 83 21 IC 950.

Effect of Conditional Discharge A conditional discharge does not necessarily imply an absolute acquittance, *Nand Lal v Girdhar Lal*, 5 O W N 349 A I R 1928 Oudh 263 109 I C 633 The effect of a conditional discharge is not to terminate the Insolvency proceedings which remain pending, consequently, it does not debar an after coming creditor from proving his debt in insolvency, *Babu Lal v Khrisna Prosad*, 4 Pat 128 A I R 1925 Pat 438 6 Pat L T 410 85 I C 543

Discharge in case of concurrent adjudication by two Courts An order of discharge in case of concurrent adjudication by two Courts is bad, see 53 Cal 866 44 C L J 454 A I R 1927 Cal 163 99 I C 736, cited at p 239, ante

Discharge by Foreign Court A discharge from debt or liability under the Bankruptcy laws of a foreign country or one of the British Colonies, such as Ceylon, where the debt or liability was contracted is a valid discharge therefrom in British India The fact that the parties intended the debt to be paid in British India does not affect its validity, *Magadhu Pillai Rother v Asan Muhammadhu Routler*, 9 L W 855 26 M L T 88 51 I C 38 But see *Lakshmiram v Punam Chand* 45 Bom 550 22 Bom L R 1173 59 I C 444, which has held that an order of discharge granted by the Bombay Court will be recognised by all British Indian Courts, though not by a foreign Court Cf *Yolohama Specie Bank Ltd v Curlender*, 43 C L J 436 (447) A I R 1926 Cal 898 96 I C 459

Power to review or revoke discharge A Bankruptcy Court seems to have power to review, rescind or vary an order of discharge Cf sec 108 of the Eng Bankruptcy Act So a discharge fraudulently obtained can be revoked, see Robson, p 657 Cf *Re Dayabhai Sarup Chand*, 23 Bom 474

Appeal An appeal from an order under this section on an application for discharge lies to the High Court under sec 75 (2) read with Schedule I Where an order of discharge

is made on condition of the insolvent making certain payments to a certain creditor, the latter will not, by reason of his receiving payments, be deprived of his right of appeal against the order of discharge Cf *Sitaram v Redden*, A I R 1926 Cal 529 91 I C 760 The receiver has a right of appeal against an order of discharge, Cf *In re Stanton*, (1887) 19 Q B D 182

42. [§ 44, (3)] (1) The Court shall refuse to grant an absolute order of discharge *under section 41* on proof of any of the following facts namely—

Cases in which Court must refuse an absolute discharge

- (a) that the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities unless he satisfies the Court that the fact that the assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible,
- (b) that the insolvent has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency,
- (c) that the insolvent has continued to trade after knowing himself to be insolvent,
- (d) that the insolvent has contracted any debt provable under this Act without having at the time of contracting it any reasonable or probable ground of expectation (the burden of proving which shall lie on him) that he would be able to pay it,
- (e) that the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities,
- (f) that the insolvent has brought on, or contributed to, his insolvency by rash and hazardous speculations, or by unjustifiable extravagance in living, or

by gambling, or by culpable neglect of his business affairs,

- (g) that the insolvent has, within three months preceding the date of the presentation of the petition, when unable to pay his debts as they became due, given an undue preference to any of his creditors,
- (h) that the insolvent has on any previous occasion been adjudged an insolvent or made a composition or arrangement with his creditors
- (i) that the insolvent has concealed or removed his property or any part thereof, or has been guilty of any other fraud or fraudulent breach of trust

(2) [§ 44 (4)] For the purposes of this section, the report of the receiver shall be deemed to be evidence, and the Court may presume the correctness of any statement contained therein

(3) [§ 44 (5)] The powers of suspending and of attaching conditions to an insolvent's discharge may be exercised concurrently

This is old sec 44 (3), (4) & (5) Compare it with sec 26 (3) (6) & (8) of the Bankruptcy Act, 1914 It lays down the circumstances under which the Court is bound to refuse to grant an absolute order of discharge See *Re Mormusji*, 17 Bom L R 313 When the various facts mentioned in the clauses (a) to (i) are proved, the Court is bound to give effect to the provision of this section by refusing an absolute discharge to the insolvent It will be seen that the various facts mentioned in the said clauses may be compendiously described as acts of fraud and bad faith or simply as misdemeanours If the debtor be guilty of any of these acts, he might be deprived of the ultimate benefit of the Insolvency Act, see *Uday Chand v Ram Kumar* 12 C L J 400 15 C W N 213, *Samuruddin v Kadumoyi*, 12 C L J 445 14 C W N 244, *Gopiram Bholica v Biraj Mohan* A I R 1929 Cal 5-6 But when he is not so guilty this section would not stand in the way of the insolvent getting his discharge, *Suraj Pal v Shub Lal*, (1930) A L J 384 Although, the grant of absolute discharge may be inexpedient

because of the insufficiency of the assets to cover a moiety of the unsecured liabilities and because of the extravagance of the insolvent, yet it is open to the Court either to suspend the order of discharge for a specified period or to grant an order of discharge subject to conditions, *Debi Dayal v Sarmukh Singh*, AIR 1920 Lah 281 11- IC 662. It is only when the insolvent applies for discharge and not in the initial proceeding that the Court is to visit with its due consequences any misconduct on his part, *Chatrapat Singh v Kharag Singh*, 44 Cal 535 (541) PC 25 CLJ 215 21 CWN 497. It should be noticed that this section only refers to clause (a) of sec 41 2) and does not refer to clauses (b) and (c) thereof. Therefore the Court's discretion with regard to the period of suspension under the sub clause (b) or the conditions to be laid down under the said clause (a) with respect to the subsequent earnings or income of the insolvent cannot be fettered by this section *Debi Prasad v Allen Grant* a IC 916 (All).

Refusal of absolute Discharge—The facts proof of which will disentitle the insolvent to an order of discharge, are—

(a) that the insolvent's assets are not worth *half* his unsecured liabilities unless he proves that this state of things has resulted from circumstances beyond his control.

(b) that he has not kept the usual books of account of his business showing his financial condition *net* within three years before the insolvency proceeding. Cf *Li Mutt n* (1887) 19 QBD 102.

(c) that he has continued to trade with a knowledge of his insolvency.

(d) that he has contracted debts without any hope of repayment.

(e) that he has failed to account for the loss or deficiency of his assets.

(f) that his insolvency is the result of his hazardous speculations, extravagance, gambling and culpable neglect of business affairs.

(g) that he gave undue preference to one creditor within three months preceding his insolvency petition though unable to pay his debts.

(h) that he was previously adjudged an insolvent and made a composition with his creditors.

(i) that he has concealed or removed his property or was otherwise guilty of fraud.

The Indian Reports do not furnish many cases to illustrate the various circumstances contemplated in the above clauses. But there are innumerable cases in the English Reports and they are simply too many to be incorporated here. A summary of all the cases may be found in Halsbury's *Laws of England*,

Vol II, pp 251—262 Where an insolvent's assets are not of a value equal to 8 as in the rupee and he obstructed the Receiver in paying debts, an order refusing to discharge him is proper, *Jagmohan v Deputy Commissioner, Fyzabad* AIR 1925 Oudh, 112 80 IC 54 The provision of 8 as in the rupee is not to be so construed as to empower the Court to suspend discharge until a larger dividend has been paid To give such a power to the Court and thus in effect, compel the debtor to work for his creditors to an extent beyond the prescribed sum as a condition of his discharge is not to be implied from the section, *Re Kutner*, (1921) 3 KB 93 (CA) Ordinarily, where an insolvent's assets cover moiety of his liabilities, he should be liberated from the bondage of bankruptcy unless it is established that his case falls under the provisions of cls (b) to (i) of the section, *And Lal v Girdhari Lal*, 5 O W N 347 AIR 1928 Oudh 26, 109 IC 633 The fact that the assets of an insolvent are less than eight annas in the rupee on the amount of unsecured liabilities does not stand in the way of the insolvent procuring his discharge where it has not been shown that this state of things has been brought about by any fraudulent act on the part of the insolvent or by circumstances which he could not have controlled, *Suraj Pal v Shub Lal*, AIR 1929 All 843 119 IC 16 The form in which the above proposition has been formulated does not appear to be very accurate, because in the event of the insolvent's assets not covering a moiety of his assets, the onus is on the insolvent to show that the deficit arose from circumstances beyond his control The law seems to have been rightly stated in *P N Dutt Choudhuri v J H Blades*, AIR 1928 Cal 843 115 IC 585, which says that where the assets of an insolvent are not of value equal to at least 8 annas in the rupee on the amount of his unsecured liabilities, the Insolvency Court cannot discharge the insolvent even though there is nothing in the report of the Receiver to stand in the way of the discharge, unless the insolvent satisfies the Court that the assets were not of the requisite value from circumstances for which he could not be held justly responsible s c, *sub nomine Satish Chandra v J N Blades*, 48 CLJ 550 Where the insolvent adduces no evidence to discharge the above onus, viz of proving bankruptcy from circumstance, beyond control, the Court has no jurisdiction to pass an order of discharge, *Shantilal v Raj Narain*, AIR 1929 All 858 As to how suppression or non submission of books of accounts affects the question of discharge, see *A K R Firm v Shaik Jooman*, 5 Rangoon, 50

"Assets" in clause (a) of this section means the realisable property which the insolvent possesses at the material moment It does not include future earnings which are unsaleable, *Debi Prosad v Allen Grant*, 39 IC 916 (918) The section provides

and defines a *quasi* offence with regard to the keeping of accounts, which if established is a ground for a kind of penal order, postponing the absolute discharge of the insolvent when he applies for it, *Gangaprasad v Madhuri Saran*, 25 A L J 331 A I R 1927 All 352 100 I C 550 The benefit of this Act is intended for honest and straightforward but unlucky traders and cannot be extended to those traders who fail to keep proper accounts or who deal extravagantly and contract debts recklessly, *S R M C T Chetty v Ho lung Gyi*, 5 Bur L T 80 15 I C 276 Omission to keep accounts is a grave offence against commercial morality which a Bankruptcy Court will take serious notice of, see *Ex parte Reed*, (1886), 17 Q B D 244 (253)

As to the meaning of the term "Trade", see sec 65 of the Statute 25 and 13 Vic cl 106 and *Re Momet*, 21 Cal 1018 The ordinary right of a man to pursue a losing concern does not subsist on the brink of bankruptcy or at the peril of his creditors, *Re Stanton*, (1887) 4 Morr 242 Trading will be offensive hereunder only where it is carried on with the *knowledge* of the bankruptcy But a man who has kept regular accounts can scarcely plead ignorance, except under extraordinary circumstances *Re Heap*, 4 Morr, 314 The conduct of a man who incurs debts with the consciousness that he has no reasonable chance of repaying them is also reprehensible, see *Re Coate*, 5 Cal 70, and to such a man the Court will not grant an absolute discharge In a great majority of cases in this country, the insolvents fall within the purview of this sub-section, but our Courts in their transcendental indifference to law seldom take the trouble of turning over the pages of law books It should be noted that the *onus* of proving reasonable or probable ground of expectation is on the insolvent, and an adverse inference should be drawn from his inability to discharge such onus

If a man borrows money, he is responsible for his act notwithstanding that the man who has lent him money has acted foolishly It is the insolvent's conduct that has to be considered He should not be discharged when his assets are proved to be low unless he satisfies that he had no control over the circumstance The Act is meant for honest debtors and not reckless ones and the provisions of this section are mandatory, *Kalleappa Chetty v Maung Kwee*, 3 Bur L T 122 5 L B R 189 8 I C 950 It is a matter of great pity that very few of our subordinate Courts take the above legal principle into consideration while granting discharge

Cl (c) Trading with knowledge of bankruptcy

Cl (d) Reasonable expectation

Cl (f) Hazardous speculations

Cf also *Re Harmusji Ardeshur*, 17 Bom L R 313. A "rash" speculation is one into which no reasonable man would enter, *Ex parte Douman*, (1863) 32 L J 49. "In my opinion a speculation which no reasonably careful man would enter into having regard to all the circumstances of the case is a rash and hazardous speculation" per Lopes L J in *Ex parte Keays*, (1891) 9 Morr 12. For instances of rash and hazardous speculations see *Re Braginton*, 14 L T 277, *Re Wilson*, 14 L T 492. What is rash and hazardous must be determined with reference to all the circumstances of the case, and an allegation about it must be specific and clearly proved, *Re John Brown & Co* (1906) 22 T L R 291. Cf *Ex parte Keays*, *supra*.

Onus of proof —Where a bankrupt has not sufficient assets for paying a sum equal to eight annas in the rupee on the amount of the unsecured liabilities, the burden is upon him to show that the reason for the state of affairs has arisen from circumstances for which he could not be justly held responsible *Sant Lal v Raj Narain*, 119 I C 4 (All).

Sub-sec. (2). Report of the Receiver For the purposes of this section, the report of the receiver shall be deemed to be evidence and it will be presumed to be correct, unless shown to be otherwise, see *Chinnamcra v Kumara Chakravarti*, 56 I C 906, Cf *Abdul Kader v Official Assignee*, 25 M L J 320, 20 I C 482, *Nanda Kishore v Surajmal*, 37 All 429, 13 A L J 642, 29 I C 998, also *Harihar v Maheshur*, 18 C W N 692, 27 I C 192, *Simul Roither v Kumarappa*, 35 I C 875. Vide also the notes and cases under s 41 (2).

Sub-sec. (3). The powers of suspending, and attaching conditions to an insolvent's discharge may be exercised concurrently, that is, the Court can suspend the order of discharge and at the same time attach conditions thereto, see cls (b) and (c) of sec 41 (2). It would have been more appropriate, if this sub section were transferred to sec 41, *ante*.

Effect of refusal of Discharge The refusal of a discharge has the effect of terminating the proceedings *so far as that Court is concerned* and consequently no insolvency proceedings are then pending so as to bar an application for execution under the provisions of sec 28 (2), *Maung Po Tole v Maung Po Gyi*, 5 Rang 497, A I R 1926 Rang 2, 92 I C 142. Cf *Rorie & Co v Tan Thean*, 2 Rangoon, 643, 84 I C 909. The above words in italics should be carefully noted and should be compared with the ruling in *Rorie & Co's case*, (cited at p 258), following which the Madras High Court has held that the refusal of final discharge does not *ipso facto* determine the insolvency proceedings, *Alamelu Ammal v Venkatarama Iyer*, 50 Mad 977 (1927) M W N 593, 53 M L J 422, A I R 1929 Mad 1919. When an Insolvency Court has refused discharge to an insolvent the same Court cannot

vary the order of refusal, *In Re Henry R Smith*, 32 I C 575 9 S L R 132 But this does not mean that an order of refusal once made will last through eternity or will preclude renewal of application for discharge, *Mullapatti Gopalan v Koppothul Gopalan*, A I R 1925 Mad 915 22 L W 202 (1925) M W N 612 91 I C 31 Vide notes under sec 44 The refusal of an application for discharge does not prevent the insolvent from renewing his application for discharge in case fresh circumstances might justify him in doing so, *Tan Seik Ke v C A*

M C T Firm, 109 I C 769, *Mulchand v Official Receiver*, [1930] A L J 316 Dismissal of application for discharge does not bar a renewal of application therefor 124 I C 410, as it is not desirable to brand a person with the ignominy

of an undischarged insolvent or to subject him to the disability of such a person, for his whole life Likewise, it was held in *Thana Velayatha v Subramania*, (1928) M W N 175 A I R 1928 Mad 609 109 I C 636, that the dismissal of an application for discharge will not prevent him from presenting further application for discharge at any later time Read the last heading under sec 44, *infra*

43. [New] (1) If the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of section 37 shall apply accordingly.

(2) Where a debtor has been released from custody under the provisions of this Act, and the order of adjudication is annulled under sub-section (1), the Court may, if it thinks fit, re-commit the debtor to his former custody, and the *officer in charge* of the prison to whose custody such debtor is so re-committed shall receive such debtor into his custody according to such re-commitment, and thereupon all processes which were in force against the person of such debtor at the time of such release as aforesaid shall be deemed to be still in force against him as if no order of adjudication had been made

and Scope of the Section: This section is new to compel the insolvent to apply for discharge

within a prescribed period, or to forego the benefit of the insolvency law *Chinnappa Reddi v Kola Kula*, 51 Mad 839 54 M L J 344 A I R 1928 Mad 26 109 I C 581 As to the legislative reason for the enactment of this new section see Sir George Lowndes's speech quoted at p 92, *ante* See also the Statement of Objects and Reasons, paragraph 3 The section is controlled by sec 27, *Suppiah Moopanar v Mallappa Chetty*, (1929) M W N 809 A I R 1930 Mad 342, *Jethaji Peraji Firm v Krishnappa* (1929) M W N 489 Without an order of the Insolvency Court, an insolvent is not discharged *automatically* at the end of the period fixed in the order of adjudication, *Hariram v Krishan Ram*, 49 All 201 25 A L J 152 A I R 1927 All 418 100 I C 320 *Chinnastuamy Pillai, In re* (1929) M W N 809 The annulment of adjudication does not *ipso facto* come into operation without an express order of the Court to that effect, see *Ganpat v Harigir* A I R 1929 Nag 11 113 I C 357, *Gopal Ram v Magni Ram* 7 Pat 375 107 I C 830 (F B) *Vide* notes at p 158 Cf *Abraham v Sookias*, 51 Cal 337 81 I C 583 Sec 43 of the Act does not operate as an automatic annulment on the failure of the debtor to apply for a discharge, *Palani Goundan v Official Receiver*, 58 M L T 369 31 L W 365 A I R 1930 Mad 389—following A I R 1924 Cal 777 An order cancelling an adjudication does not amount to a discharge within the meaning of the section, *Ram Sarup v Khalil-ul Rahman*, 26 Punj L R 117 A I R 1925 Lah 376 87 I C 348 (An order of annulment of adjudication is not invalid merely because of want of notice to the creditor) *Kalu Kutty Parambath v Puthen Peetikakkal* 49 M L J 595 22 L W 542 A I R 1926 Mad 123 91 I C 144 Where no time is fixed in the order of adjudication within which the insolvent is to apply for his discharge, this section has no application, and the adjudication cannot be annulled for failure to apply for discharge, *Firm Jai Singh v Nirmal Das*, 7 L L J 553 A I R 1926 Lah 24 92 I C 235 Where the Court does not specify the time within which the insolvent is to make an application for discharge in terms of sec 27 (1), the penalty prescribed by this section does not come into operation, *Gopal Ram v Magni Ram*, 7 Pat 375 107 I C 830

The section does not contemplate automatic discharge

Sub-sec. (1): Annulment of Adjudication The adjudication is to be annulled under this section in the following three contingencies

- (i) if the debtor does not appear on the date of hearing of the application for discharge, or
- (ii) if he does not appear on an adjourned date on which he is directed to appear, or

(iii) if he does not apply within the period allowed under
sec 27

Where the Court in consideration of the fact that the insolvent had not paid a sufficiently large amount of his debt, directed him while applying for discharge to pay certain amount every month and further to renew his application for discharge "six months hence", its order is under s 42 (1), (a), and hence, if the insolvent neither pays any monthly amount nor renews his application for discharge, his adjudication cannot be annulled under this section, *J H Goo v Shib Narain*, AIR 1929 Pat 184 118 IC 332 An annulment of adjudication is merely a continuation of insolvency in another form, *Somasundaran v Peria Karuppan*, 58 M L J 658 AIR 1930 Mad 520

The Section how far mandatory

According to some opinion, the provision of this section is mandatory, *Saligram v Official Receiver*, AIR 1926 Sind 94 91 IC 467, and the Court has no option in the matter to act otherwise. So that a default on the part of the insolvent will necessarily be followed by an order of annulment, and he will not be entitled to call in aid the provisions of Order IX of the C P Code to set aside the annulment. If the default is due to any *bona fide* causes his remedy lies under sec 10 (2), and not under Or IX, *Venugopala Chariar v Chunnulal* 40 Mad 935 51 M L J 209 AIR 1926 Mad 942 (1926) M W N 674 97 IC 706 *Arunagiri Mudaliar v Kandaswami*, (1924) M W N 331 83 IC 955 AIR 1924 Mad 635 19 L W 418 34 M L T 170 Cf *Roop Narain v King King & Co*, AIR 1926 Lah 370 94 IC 234—followed in *Gobind Ram v Gheru Ram*, 112 IC 768, *Yerra Venkatagari v Madipatta*, (1927) M W N 176 101 IC 349 Also Reilly J's view in *Jethaji Peraji Firm v Krishnaji*, 52 Mad 648 57 M L J 116 AIR 1930 Mad 278 29 L W 649 (1929) M W N 489 122 IC 351 It has been maintained that the Court has no power to extend the time after the period specified in the order, *Tirumala Reddi v Kotalula Thomasa* 51 Mad 839 54 M L J 344 27 L W 311 (1928) M W N 177 AIR 1928 Mad 265 109 IC 581 It is open to the parties to ask for extension of time within the period fixed by the adjudication order, but if that is not done, this section takes its course. That is the Court has no option but to annul the adjudication [*Gobind Ram v Gheru Ram*, 112 IC 768, *Pandit Bindrabai v Official Receiver*, AIR 1930 Rang 166] The fact that a sale by the receiver is challenged by a third party is no ground for enlarging the time, *ibid* see also *Gopal Ram v Magni Ram*, 7 Pat 375 AIR 1928 Pat 338 107 IC 830 Cf 52 Mad 648, *infra* The mandatory provision of the section fetters the discretion of the Court, and cripples its power to enlarge the time after

the expiry of the period fixed for an application for discharge, *Ram Krishna, Ex parte*, 4 Pat, 51 AIR 1925 Pat 355, 6 Pat LT 776 88 IC 70, *Amjad Ali v Mohammad Ali*, AIR 1927 Oudh 506 4 O W N 993 105 IC 912, *Girja Charan v Sheoraj Singh*, 5 O W N 686 AIR 1928 Oudh 376 111 IC 903. According to this last case, if the delay was justifiable the insolvent's remedy would lie in a fresh application for adjudication. But a contrary view has been taken in Sind in *Saligram v Official Receiver, supra*, to the effect that although the provision of this section is mandatory, still the Court has a discretion to extend the period for an application for discharge under sec 27 (2) or by importing the principle of sec 148 of the C P Code, and thereby keep the insolvency proceedings alive for the administration of the debtor's estate to the full benefit of the creditors. Cf *Badri Narain v Sheo Koar* 17 IA 1 17 Cal 512, *Bhagandas Bagla v Haji Abu Ahmed*, 16 Bom 263. Vide also under sec 27 (2) and 100 IC 137. Cf *K K S Chettiar v Maung Myat Tha*, AIR 1927 Rang 136 100 IC 921. The Court can extend the time for discharge for good cause shown and is not bound to annul the adjudication order, *Ibid*, but the Rangoon High Court has recently ruled that extension of time under sec 148 C P C cannot be granted in cases where the insolvent fails to apply for discharge within the time fixed by Court, since the provisions of s 43 (1) are mandatory and the powers given by sec 5 are to that extent limited, *Pandit Hindatan v Official Receiver*, AIR 1930 Rang 166. All that is intended by sub sec (1) hereof is that if no one applies for an extension of time or no extension of time is given, the Court must then annul the adjudication, *Palani Goundan v Official Receiver Coimbatore* 53 Mad 288 31 LW 365 58 MLJ 396 AIR 1930 Mad 389 124 IC 61 (FB). Cf Venkata Subba Rao J's opinion in 52 Mad 648 57 MLJ 116 *supra*. Vide also the notes and cases at p 158, ante. So it has been said that this section should be read in conjunction with s 27 which governs or controls it and the Court has a discretion to extend the time, *Manikkam Pattar v Nanchappa Chettiar*, (1928) M W N 441, and that time may be extended even after the expiry of the period limited in the order of adjudication for discharge, *Kunnamul Nathmul v Inoop Sahu* 108 IC 803, *Sohna Ram v Tara Chand*, AIR 1927 Lah 399 117 IC 87, provided an order of annulment has not already been made, and this can be so done either under sec 5 taken with sec 148, C P C, or under sec 27 (2) of this Act, see *Palani Goundan v Official Receiver, Coimbatore, supra*. In any view of the case all that the section says is that adjudication shall be annulled, it does not say that the order of annulment should be made immediately or forthwith, there-

fore the section does not necessarily negative the Court's power of enlarging the time, *Reau* a very learned Article in AIR 1930 Journal p 25 Besides, why sec 148 C P C cannot be called in aid by reason of sec 5 of this Act, also is a matter not very easy to appreciate In extending the time the Court should use its discretion judiciously Extension of time being a matter of discretion the High Court will not interfere in revision with an order of the lower Court granting such an extension, *Manikkam Pattar v Nauchappa Chettiar*, (1928) M W N 441

Court to move suo motu or an application of Creditor :—

The Court can take action under this section *suo motu* Cf 101 I C 589, *infra* The creditor, who is affected by the order of adjudication, is also entitled to apply for annulment of adjudication hereunder, *Arunagiri v Kanda Sوام* 19 L W 418 (1924) M W N 331 AIR 1924 Mad 635 There is however no such thing as an *automatic* annulment Cf

Notice

Abraham v Sookias, 51 Cal , 337 , also
Jethaji Peraji Firm's case, above cited

The section merely requires that sufficient cause should be shown, but it does not say by whom such cause has to be shown Therefore the Court can grant extension of time on the application of anybody interested, *Subbiah Mooppanar v Mallappa Chetty* (1929) M W N 809 (2) AIR 1930 Mad 342 124 I C 219 , *Ganpat v Harigiri* AIR 1929 Nag 11 113 I C 357 Before making an order enlarging the time for discharge on the application of the creditor, assented to by the receiver, the Court should issue a notice to the alienees , but an omission to issue the notice will not necessarily invalidate the order granting the extension *Ibid* The Court, before annulling an adjudication for failure to apply for discharge within the appointed time, should issue a notice on the creditor who made an application under s 53 of the Act and the Receiver, otherwise they may be prejudicially affected by an *ex parte* order, *S V A R S Firm v Maung Pau*, 6 Bur L J 44 AIR 1927 Rang 173 101 I C 589 But no notice need be issued to the insolvent calling upon him to show cause why the adjudication should not be annulled, *Gopal Ram v Magni Ram*, 7 Pat 375 9 Pat L T 329 AIR 1928 Pat 338 107 I C 830 Cf the notes under the heading "notice" at pp 108 & 116, *ante*

Effect of annulment

When an adjudication is annulled under this section, the provisions of sec 37 may apply , so that all intermediate dealings with the insolvent's property by the Court or Receiver will be valid *Vide* at p 241 , also 58 M L J 658 AIR 1930 Mad 520 When the adjudication was at the instance of a creditor, an appointment under sec 37 should in-

the expiry of the period fixed for an application for discharge, *Ram Krishna, Ex parte*, 4 Pat, 51 AIR 1925 Pat 355 6 Pat LT 776 88 IC 70, *Amjad Ali v Mohammad Ali* AIR 1927 Oudh 506 4 O W N 993 105 IC 912, *Girja Charan v Sheoraj Singh*, 5 O W N 686 AIR 1928 Oudh 376 111 IC 903 According to this last case, if the delay was justifiable the insolvent's remedy would lie in a fresh application for adjudication But a contrary view has been taken in Sind in *Saligram v Official Receiver, supra*, to the effect that although the provision of this section is mandatory, still the Court has a discretion to extend the period for an application for discharge under sec 27 (2) or by importing the principle of sec 148 of the C P Code, and thereby keep the insolvency proceedings alive for the administration of the debtor's estate to the full benefit of the creditors Cf *Badri Narain v Sheo Koar* 17 IA 1 17 Cal 512, *Bhagandas Bagla v Haji Abu Ahmed*, 16 Bom 263 Vide also under sec 27 (2) and 100 IC 137 Cf *K K S Chettiar v Maung Myat Tha*, AIR 1927 Rang 136 100 IC 921 The Court can extend the time for discharge for good cause shown and is not bound to annul the adjudication order, *Ibid*, but the Rangoon High Court has recently ruled that extension of time under sec 148, C P C cannot be granted in cases where the insolvent fails to apply for discharge within the time fixed by Court, since the provisions of s 43 (1) are mandatory and the powers given by sec 5 are to that extent limited, *Pandit Bindratan v Official Receiver*, AIR 1930 Rang 166 All that is intended by sub sec (1) hereof is that if no one applies for an extension of time or no extension of time is given, the Court must then annul the adjudication, *Palani Goundan v Official Receiver, Coimbatore* 53 Mad 288 31 L W 365 58 M L J 396 AIR 1930 Mad 389 124 IC 61 (FB) Cf Venkata Subba Rao J's opinion in 52 Mad 648 57 M L J 116, *supra* Vide also the notes and cases at p 158, ante So, it has been said that this section should be read in conjunction with s 27 which governs or controls it and the Court has a discretion to extend the time, *Manikkam Pattar v Nanchappa Chettiar*, (1928) M W N 441, and that time may be extended even after the expiry of the period limited in the order of adjudication for discharge, *Kunnamul Nathmul v Inoop Sahu*, 108 IC 803, *Sohna Ram v Tara Chand*, AIR 1927 Lah 399 117 IC 87, provided an order of annulment has not already been made, and this can be so done either under sec 5 taken with sec 148, C P C, or under sec 27 (2) of this Act, see *Palani Goundan v Official Receiver, Coimbatore, supra* In any view of the case all that the section says is that adjudication shall be annulled, it does not say that the order of annulment should be made immediately or forthwith, there-

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Court to move suo motu or an application of Creditor :—

The Court can take action under this section *suo motu* Cf 101 I C 589, *infra* The creditor, who is affected by the order of adjudication, is also entitled to apply for annulment of adjudication hereunder, *Arunagiri v Kanda S. Ram* 19 L W 418 (1924) M W N 331 AIR 1924 Mad 635 There is however no such thing as an *automatic* annulment Cf *Abraham v Sookias*, 51 Cal , 337 , also Notice *Jethaji Peraji Firm's* case, above cited

The section merely requires that sufficient cause should be shown, but it does not say by whom such cause has to be shown Therefore, the Court can grant extension of time on the application of anybody interested *Subbiah Mooppanar v Mallappa Chetty* (1929) M W N 809 2 AIR 1930 Mad 342 124 I C 219, *Ganpat v Hanagir* AIR 1929 Nag 11 113 I C 357 Before making an order enlarging the time for discharge on the application of the creditor, assented to by the receiver, the Court should issue a notice to the alienees, but an omission to issue the notice will not necessarily invalidate the order granting the extension, *Ibid* The Court, before annulling an adjudication for failure to apply for discharge within the appointed time, should issue a notice on the creditor who made an application under s 53 of the Act and the Receiver, otherwise they may be prejudicially affected by an *ex parte* order, *S V A R S Firm v Maupg Pau*, 6 Bur L J 44 AIR 1927 Rang 173 101 I C 589 But no notice need be issued to the insolvent calling upon him to show cause why the adjudication should not be annulled, *Gopal Ram v Magni Ram*, 7 Pat 375 9 Pat L T 329 AIR 1928 Pat 338 107 I C 830 Cf the notes under the heading "notice" at pp 108 & 116, *ante*

Effect of annulment When an adjudication is annulled under this section, the provisions of sec 37 may apply, so that all intermediate dealings with the insolvent's property by the Court or Receiver will be valid *Vide* at p 241, also 58 M L J 658 AIR 1930 Mad 520 When the adjudication was at the instance of a creditor, an appointment under sec 37 should in-

variably be made, otherwise the annulment may operate to his prejudice as pointed out in 52 M L J 23 (Notes) See also *Flouer v Mayor of Lyme Regis*, (1921) 1 K B 488 Cf 100 IC 137, *infra*, also 51 Mad 839 54 M L J 344 A I R 1928 Mad 265 109 IC 581 Upon such an annulment, the debtor if released from custody under sec 23 or sec 31, will be liable to be recommitted to his former custody, and all processes which were in force against him before adjudication, will revive. In order to justify an order of recommitment, the annulment must be under sub section (1) inasmuch as every annulment of adjudication cannot lead to the adoption of such procedure Cf secs 35 36 and 39 and see pp 233 34, *ante* An *ex parte* order of annulment cannot be set aside under O IX, C P C but a fresh application can be made under sec 10 (2) *Venu gopalachariar v Chunnulal* 49 Mad, 935 51 M L J 209 (1926) M W N 64 9 IC 706 An order of annulment does not prevent a creditor who has not proved his debt from proceeding to enforce it in a Civil Court, *Molunlal Kishindas v Ghansamdas* A I R 1929 Sind 204

Sub-section (2): Under the provisions of this Act :—

See secs 23 & 31

Appeal A creditor is aggrieved by an order under this section refusing to annul an adjudication, and can therefore appeal by leave under sec 75 (3), *Arunagiri v Kandasami* 19 L W 418 34 M L T 170 (1924) M W N 331 An order annulling an adjudication is appealable only with leave, *Shordan Lachmi v Bahadur Chand* A I R 1927 Lah 914 100 IC 137 As to which Court is to grant leave, *vide* notes under sec 75 (3) *infra* It requires no great effort to follow that a creditor is a person who can be called to have been aggrieved by an order of annulment, *Apireddi v Venkatarreddi*, 51 M L J 60 23 L W 644 (1926) M W N 256 A I R 1927 Mad 175 94 IC 351 see also *Re Henry Langtry* (1894) 1 Manson 169 *Ex parte Ditton* (1879) 11 Ch D 56 An order granting an extension of time for discharge is not a decision under s 4 and is therefore not open to second appeal 52 Mad 337, cited under sec 75 Proviso ii

Review of the order of annulment Although this Act does not contain a specific provision like sec 108 of the English Bankruptcy Act 1914, still by reason of the provisions of sec 5 of this Act, an Insolvency Court has been conceded the power of reviewing its own orders, [*vide* the cases under the heading "Review" at p 47, *ante*], so much so that a District Judge even in his appellate jurisdiction has been held competent to review his (appellate) judgment, *Munnulal v Kunja Behari Lal*, 44 All 605 A I R 1922 All 206

44. [§ 45] (1) An order of discharge shall not

Effect of order of discharge release the insolvent from—

- (a) any debt due to the Crown,
- (b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party,
- (c) any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party, or
- (d) any liability under an order for maintenance made under section 488 of the Code of Criminal Procedure, 1898

(2) Save as otherwise provided by sub section (1), an order of discharge shall release the insolvent from all debts *provable under this Act*

(3) An order of discharge shall not release any person who at the date of the presentation of the petition, was a partner or co trustee with the insolvent, or was jointly bound or had made any joint contract with him or any person who was surety for him

Change of Law —This section corresponds to sec 45 of the Act of 1907 and sec 28 of the Bankruptcy Act, 1914. The only changes introduced in this section are—(1) Clause (d) has been added (2) In sub sec (2) the words “provable under this Act” have been substituted for the words “entered in the schedule” of the old Act

Effect of Discharge The effect of an order of discharge is to release the insolvent from all debts provable under this Act save and except those mentioned in the clauses, (a), (b), (c) and (d) even if the creditor deliberately chooses not to prove his debts in the insolvency proceedings, *Ram Rao v Hasudeo* AIR 1928 Nag 336 110 IC 893. See *Khalil ul-Rahman v Ram Sarup* 8 L.L.J 286 26 Punj L.R 588 A.I.R 1923 Lah 487 95 IC 204, *Natesa Chettiar v Annamali Chettiar*, 17 L.W 319 AIR 1923 Mad 487 73 IC 213, *Fida Husain v Collector of Shahjahanpur* 17 O.C 267 25 IC 708, *Motumal Kishindas v Ghansamdas*, AIR 1929 Sind 204. As to what debts are provable under this Act, see sec 34, ante. A surety who is compelled to pay the creditor after the discharge of an insolvent debtor is not entitled to recover from the insolvent the amount paid by him inasmuch

as the surety's contingent liability was provable and therefore the insolvent was released therefrom by his discharge, *Gangadhar v Kanhai*, 50 All 606 26 A L J 425 A I R 1928 All 306 109 I C 421 The word **Release** shows that the debt is extinguished The law of insolvency does not simply bar the remedy just as the law of limitation does, but also extinguishes the debt That is also the view taken under the English Bankruptcy Act, *Thompson v Cohen*, L R 7 Q B 527, (532), *Jones v Phelps*, (1871) 20 W R 92 and *Heather v Webb*, (1876) 2 C P D, 1 So it seems that though a barred debt can form good consideration for a valid contract, a released or discharged debt cannot "A promise to pay a debt barred by an order of discharge without fresh consideration is nudum pactum — Halsbury's *Laws of England*, Vol II, p 269 For a contrary view, see *Haro Prio v Shama Charan* 16 Cal, 592 but that will not be good law under the present Act "Discharge" in fact stands for the financial freedom which an insolvent purchases by a surrender of his whole property, *Re Gaskell*, (1904) 2 K B 478 It makes him a free man again, able to earn his livelihood and having the ordinary inducements to industry *Ibid* The discharge will entitle an insolvent to effect a valid transfer in respect of a property which the Receiver has abandoned as worthless or unrealisable, *Sheonandan v Kashi*, 39 All, 223 37 I C 878 15 A L J 79 An order cancelling an adjudication does not amount to a discharge within the meaning of this section *Ramsarup v Khalil ul Rahman*, 20 P L R 117 A I R 1925 Lah 376 87 I C 348—affirmed in 8 L L J 286 95 I C 204 *supra*

The debts from which the debtor is not released by reason of his discharge are —

- (1) Debt due to the Crown
- (2) Debt or liability incurred by his own fraud or fraudulent breach of trust
- (3) Debt not pressed for by reason of his fraud
- (4) Liability to pay maintenance under an order under sec 488, Cr P Code

Of course, an order of discharge will not affect the rights of a secured creditor, *Sridhar v Alma Ram* 7 Bom, 455 In the absence of any proof of a final discharge, a judgment debtor adjudicated in 1878 is not entitled to protection from execution under a decree obtained in 1891, *Jogendra Chandra v Sham Das* 36 Cal 543 9 C L J 271 1 I C 168 For the meaning of the word "release" see *Thompson v Cohen* L R 7 Q B 527 (532) The effect of discharge materially differs from that of composition in one respect It gives protection against all debts scheduled or unscheduled, whereas composition gives protection only in respect of the scheduled debts, see *Ram Sarup v Khalil ul Rahman*, *supra*

Effect of Discharge outside British India There is no obligation on the Courts outside British India to recognise an order of discharge as a complete release from debts mentioned in the order, *Lakshmiram v Punam Chand*, 45 Bom 550 22 Bom L R 1173 59 I C 444 Cf *Potter v Broun*, 5 East 124, *Armani v Castrique*, 13 M & W 447, *Darva najagam Pillai v Muthu Kumarasamy*, 14 I C 560 Vide notes under the heading "Discharge by Foreign Court" at p 260, ante

Cl. (a): Crown Debts In determining whether a debt falls under the denomination of a Crown debt, the question is not in whose name the debt stands, but whether the debt when recovered falls into the coffers of the State, *Judah v Secretary of State*, 12 Cal , 445 45-), also *Secretary of State v Bombay L S Co*, 5 B H C O C 25 A debt, arising out of a sale of opium, due to the Secretary of State, will be Crown debt, 12 Cal , 455 For a few relevant cases on the question of Crown debts see *Gavanoda v Butto Kristo*, 33 Cal , 1040 10 C W N , 857 The reason why Crown debts are given reference will be found in the facts that the title of the King prevails over that of the individual and the private interests are subordinated to those of the State, *See South Wales Taxation Commissioner v Palmer*, 1907 A C 179

Cls. (b & c): Fraud and fraudulent breach of trust:— Clauses (b) and (c) distinctly show that the debtor must be a party to the fraud or fraudulent act mentioned therein So where the liability is incurred by reason of the fraud of a co partner these clauses will not apply, *Cooper v Prichard*, (1883) 11 Q B D 351 As to instances of fraud etc see Halsbury's *Laws of England* Vol II, pp 260 and 270, also *Hack v Kipping*, 9 Q B D 43 Debts incurred by fraud in so far as they are the subject of actions of tort are not provable and are therefore not released by discharge, *Emma Silver Mining Co v Grant*, (1880) 17 Ch D 122, *Ex parte Hemming*, (1879) 13 Ch D 163 The promoter of a company making secret profits from the company is guilty of fraud and fraudulent breach of trust, and the debt thus created cannot be released by an order of discharge, *Emma Silver M Co v Grant supra* Same thing may be said in respect of debts incurred by issuing a false prospectus, *Duce v Duce*, (1889) 6 Morr 290 Cf also *Jenkins v Ferreddy*, (1872) L R 7 C P 358, *Napper v Fanshawe*, (1895) 2 Ch 217 2 Mans 350, *Panangupalli v Ramchandra*, 28 Mad , 157 15 M L J 1 F B

Clause (d): Order for maintenance Formerly there was some doubt as to whether liability for maintenance under an order was provable or not, see *Tokee Bibi v Abdul Khan* 5 Cal , 536, *Pamannal v Hemanmal*, 35 I C 541 Want of

any provision on his point in the old section would lead to the view that an order of discharge would release the insolvent from liability under an order for maintenance under sec 488, Cr P C—a view inconsistent with sec 45 of Presidency Insolvency Act, 1909. Hence this new clause has been enacted. See *Notes on Clauses*. Vide also the notes and cases relating to “maintenance” at p 132, ante. Though, an insolvent husband is not released from his liability under a maintenance order (under sec 488, Cr P Code) still his bankruptcy may exonerate him from a charge of *culpable neglect* within the meaning of sec 488 (3) of that Code, *Halfhide v Halfhide*, 50 Cal 867.

Sub-sec. (2.) Under the old Act, 1907, the order of discharge released the insolvent only from the debts mentioned in the schedule framed under sec 33 (1),* but under the present Act he is released from all debts provable under sec 34. Cf *Motumal Kishindas v Ghanshamdas*, AIR 1929 Sind 204. Vide notes under the heading “Effect of Discharge” *supra*. So, now after discharge an insolvent is not liable for any of his debts, provided they are provable under this Act and do not fall within the four clauses of sub-section (1), whether such debts be or be not included in the schedule. Cf *Heather v Hebb*, 2 CPD 1, or whether the creditor was or was not aware of the bankruptcy proceeding, *Elmslie v Corrie*, 4 QB D 295. Under the old Act a creditor had remedy against the debtor if the debt due to him had not been entered in the schedule, see *Ashrafuddin v Behin*, 30 Cal, 407, *Haropriya v Shama Charn* 16 Cal, 592, *Sheoraj v Gouri Sahai*, 21 All 227. The insolvent comes to Court in quest of freedom from liabilities and this Act too proposes to give him that, so, it would be simply unfortunate, if the creditor could, by keeping away from the schedule, keep alive his debt, see 16 Cal 592.

Sub-sec. (3) : Any person The order of discharge can release only the insolvent and not any other person, though such other person may be a co partner or co trustee with the insolvent or may be a joint debtor with him or his surety. Cf *Baxter v Nichol*, 4 Taunt, 90. 2 Rose, 111, 53 IC 973 (Cal). This view should not however lead to the conclusion that there cannot be any release in respect of the partnership debts—the release operates both against separate and partnership debts. Vide *Ex parte Maund*, 16 TP 615, *Ex parte Hammond* 42 LJ Bk 97. LR 16 Eq 614. As to the case of a surety, comp *Gangadhar v Kanhai*, 26 ALJ 425. AIR 1928 All 306. 109 IC 421—following *Re Blackpool Motor Car Co* (1901) 1 Ch 77.

* *Natesa Chettiar v Annamalai* 32 MLT 257. 17 LW 319. AIR 1923 Mad 48. *Lanna Lal v Kanhaiyalal* 16 Cal 85.

Refusal of discharge and fresh application for it:—
 discharge was once refused, still it is possible for the debtor to renew his application for it on new materials. Nothing in the Act warrants the hypothesis that the refusing discharge endures for all time to come, *Mullapalli*

Gopalan v Koppothul Gopalan, (1925) 100 Mad 612 22 L W 202 AIR 1925 Mad 915 91 IC 31 Cf *Tan*

Seik v C A M C T Firm, 6 Rang

R 1928 Rang 109 109 IC 769 In this connection

the provisions of sec 108 of the Eng Bankruptcy Act, see also Halsbury's *Laws of England*, Vol II, p 248

under the general powers conferred by s 108 of the Bankruptcy Act, the Court can review its order refusing

discharge, yet the proper course for it to adopt will be to exercise its power of rehearing, Cf *Re Tobias* 8 Mor 30, *Re*

106 LT 345 The refusal of discharge virtually takes

the form of a punishment, and when it is shown that the object of punishment has been effected a *de novo* application ought to

be entertained Comp *In re Tobias & Co*, (1891) 1 Q B

which negatives the idea of perpetual bankruptcy,

see *Re H R Smith* 9 SLR 133 12 IC 575, which

favours the view that refusal of discharge debars the debtor from again applying for such discharge Read also the

provisions under sec 42, *infra*

PART III.

ADMINISTRATION OF PROPERTY

Analysis This part deals with the administration of the property of the insolvent by the Court of itself or through its officer the Receiver and contains, five sets of provisions (1) Method of proof of debts (secs 45-50), (2) Effect of insolvency on antecedent transactions (Secs 51-55), (3) Realisation of property (Secs 56-60), (4) Distribution of property, and (5) Appeal to Court against Receiver, administering the property (Sec 68)

Method of proof of debts

45. [§ 29] A creditor may prove for a debt not payable when the debtor is adjudged an insolvent as if it were payable presently, and

Debt payable at a future time

may receive dividends equally with the other creditors, deducting therefrom only a rebate of interest at the rate of six per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted.

This is old sec 29 and lays down that future debts can rank for rateable distribution subject to a peculiar mode of calculation. A creditor may prove for a debt payable on a future date and not when he is adjudged an insolvent, and he may rank with the other creditors in the matter of the distribution of the debtor's assets. Cf 34 (2), *ante*. But in ascertaining the amount of his debt the following rule is to be followed. First, ascertain what the debt will amount to (together with interest) on the stipulated date of payment, then, deduct from such amount a rebate at 6 p c p a for the duration between the date of declaration of dividend and the stipulated date, *Re B & W*, *Ex parte Ador*, (1891) 2 Q B 574. See also *Ex parte Barker*, 9 Ves 110, *Ex parte Minct*, 14 Ves 189, *Re Brown*, (1891) 2 Q B 15.

A holder of a bill of Exchange not payable on the date of the act of insolvency may prove thereon, *Ex parte Stone*, (1873) 8 Ch App 914. This is so because a debt payable *in futuro* carrying interest in the meantime is regarded as a present provable debt, Mellish L J said in the last mentioned case that there is no distinction with respect to proof between a sum payable immediately and a sum payable at a future time with interest in the meantime. The fact that the debt, though *in futuro*, is carrying interest is tantamount to an admission of a present debt, see *Wace on Bankruptcy*, 1904, p 368. See also (1891) 2 Q B 574, *supra*.

46. [§ 30] Where there have been mutual dealings between an insolvent

Mutual dealings and set off

and a creditor proving or claiming to prove a debt under

this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively.

The Section This is section 30 of the repealed Act and corresponds to sec 31 of the Eng Bankruptcy Act, 1914. It gives a creditor who has mutual dealings with an insolvent, the right of set off. This right places the creditor in a rather advantageous position. But for it, the creditor would have to pay the entire amount of his debt due to the insolvent, whereas he would get only a fraction of the debt owing unto him by the debtor, see *Forester v Wilson* (1843) 12 M & W 191. See also *Baker v Lloyds Bank Ltd*, (1920) L R 2 K B 322. Thus, by virtue of this right he gets full satisfaction to the extent of the amount of set off. The object of a set off is to

prevent a great injustice which would arise if the creditor were compelled to pay the entire amount due by him, receiving only a dividend on the amount due to him, *Seth Radhakissen v Firm of Gangaram* 95 P L R 1914 53 P R 1914 118 P W R 1914 23 I C 97. Unless a set off is allowed the position on scrutiny will appear to be this that the insolvent's debts will be paid with another man's money, *Ex parte Barnett* (1874) 9 Ch App 293. Under the English law, the right of set off not existing at the date of the receiving order cannot be acquired afterwards, *Re Milan Tramways Co* (1884) 25 Ch D 58, *Elliott v Turquand* (1881) 11 App Cas 60 and the benefit of this right is not allowed to any person who at the time he gave credit to the debtor had notice of an available act of bankruptcy committed by him (see sec 38 of the Bankruptcy Act, 1883). Cf *Ex parte Young* 41 L T 40 27 W R 942. But this section does not say up to what date mutual accounts are to be taken, from the language of the section it seems that the right of set off can be allowed up to the moment when the creditor has actually to prove his debt. As seen above under the English law accounts are taken till the date of the receiving order see *Ex parte Barrell* 31 L J 41. I cite also under the next heading. With respect to the question of set-off see also the following English cases *Liberliss Hotel Co v Jones* (1887) 18 Q B D 459 *Palmer v Day & Sons* (1893) 2 Q B 618 *Re Mid Kent Fruit Co* 1896 1 Ch 507. Though the section is in terms applicable only to the case of set off as between the bankrupt and a creditor attempting to prove in the bankruptcy yet in actions brought by the Receiver for the purpose of realising the insolvent's assets a plea of set off may be raised, *Ex parte Mant* (1900) 1 Q B 546, *Peat v Jones & Co* (1881) 5 Q B D 147 and this can be so done even if the amount wanted to be set off has not been proved in bankruptcy. It seems that payments sought to be avoided as a fraudulent preference may be set off against debts due from the preferred creditor, (1893) 1 Ch 95, (1908) 1 K B

The equitable doctrine of set-off is based on substantial justice

174 (178) The section should be liberally interpreted in favour of allowing a set off Lord Fisher M R Construction of the section has thus observed in *Eberle's Hotel & Restaurant Co v Jones*, (1857) 18 Q B D 459 (465) "I should desire to give the widest possible scope to the section" See also *In re H E Thorne*, (1914) 2 Ch 438 (452)

Mutual dealings —It means dealings by the one with the other and *vice versa*, see *Booth v Hutchinson*, (1872) L R 12 Eq, 30 "By mutual credits, I conceive to mean simply reciprocal demands which must naturally terminate in a debt There is no demand or debt until dishonoured," *Miller v National Bank of India*, 19 Cal 146 When there are such mutual dealings between the insolvent and the creditor giving rise to mutual credits and debts between them, the mode of ascertaining the extent of indebtedness of either party is first to allow a set off and then to allow a claim for balance in favour of the person who holds greater credits The mutual dealings must be between the same parties, so a joint debt cannot be set off against a separate debt, nor can a separate debt be set off against a joint debt, *Bishop v Church*, (1748) 3 Atk 691

Joint Debt Thus, where the liquidators of a Bank sued the defendants on a joint promissory note, one of the defendants claimed set-off for the amount due to him from the Bank on his deposit account, but the claim for set off was disallowed on the ground that the dealings were not mutual but of different characters, *Trimbak Gangadhar v Raincha dra*, 45 Bom 1219 23 Bom L R 537 63 IC 906 The debt must be due in the same right, *West v Pryce* (1821) 2 Bing 455, *Lister v Hooson*, (1908) 1 KB 174 and parties must fill the same character, *Alliance Bank of India v Mohan Lal*, 8 Lah 105 28 Punj L R 427 AIR 1927 Lah 228 101 IC 762, in this case a person had overdrawn from a Bank in respect of his personal account, and had also another account in the name of a firm of which he was a partner, in this account, there was an amount in deposit with the Bank, the Bank going into liquidation, the liquidators sued him for the money due from him on his personal account and he wanted to set off the deposit money in respect of the account in the name of the firm, but the Court said that there were no mutual dealings This means that a partnership debt cannot be set off against a debt owing to one partner only *Ex parte Christie*, (1900) 1 QB 5 10 Ves 105, and *vice versa*, see 8 Lah 105, *supra* Cf *Fidcard v Ramdin*, 14 C W N 170, *Re Devecze*, L R 9 Ch 291 Likewise, a debt due from a person as a trustee cannot be set off against a debt owing unto him in his personal

capacity, *Bishop v Church*, (1748) 3 Atk 691, (1879) 12 Ch D 491

The right of **set-off** is allowable in cases of *cross demands* as well, *Stephen Clark v Ruthnavello Chetty*, 2 M H C R 296 (303) Cf *Set-off—when allowable and when not* *Baker v Lloyds Bank Ltd* (1920) L R 2 K B 322 This right operates in respect of all those mutual dealings which terminate, or, have a *natural tendency* to terminate, in debts, *Re Canthom*, 33 Mad, 53, also see *Rose v Hart*, (1818), Sm L C Vol 2, p 298, *Chengal Iaraya v Official Assignee Madras*, 33 Mad, 467 7 M L T 207, *Miller v National Bank of India*, 19 Cal, 146 (147) *supra* not followed in 35 Mad 53, *supra*, *James Young v Bank of Bengal* (1836) 1 M I A 87, distinguished in *Alsager v Currie* (1844) 12 M & W 751 and in *Naoraji v Chartered Bank of India* (1868) L R 3, Ch Prac 444, which says that “mutual credit means simply reciprocal demands which must naturally terminate in a debt”—approved in *Astley v Gurney*, (1869) 4 C P 714, also in (1881) 7 A C 79 and (1900) 1 Q B 546 (569), *infra* This section applies only where there are mutual dealings between the parties, *Chetandas v Ralli Brothers* A I R 1925 Sind 153 83 I C 135 There cannot be any set off where there is no mutual dealing, *Trimbai Gokhale v Ram Chandra*, 45 Bom, 1210, *supra* A set off cannot arise unless the amounts recoverable by each party be *ascertained*, 14 C W N 170, *supra* An ascertained sum does not mean a sum admitted but a sum the amount of which is known, *Ibid* Cf O viii, r 6, C P Code, which was enacted to prevent *cross actions* There must be a *definite* balance on adjustment of the debit and credit sides of the account, *Har Prosad v Ram Swarup* 82 I C 340 Where one party has to return certain shares (held in security for a certain debt) in specie in order to be entitled to sue upon the debt, no question of set-off can arise under the mutual credit clause of the Bankruptcy Act, see *Trustee of the Property of Ellis & Co v Dixon Johnson*, (1925) A C 489 (1924) 2 Ch 451 94 L J (Ch) 221 As a general rule *goods cannot be set off against money*, *Eberles Hotel Co v Jones* (1887), 18 Q B D 459, *Lord Trustee v G E Ry Co*, (1908) 2 K B 54, but where authority has been given to convert goods into money, set-off may be allowed, *Rose v Hart*, *supra* *Naoraji v Chartered Bank of India*, *supra* It seems that there is no right of set off where money or goods are deposited for a specific purpose, see *Atkinson v Elliott*, (1797) 7 T R 378 *Key v Flint* 8 Taunt 21, *Buchanan v Findlay*, (1829) 9 B & C 738 Cf *Clarke v Fell*, *infra* Where there is no mutual credit or mutual debit, there is no question of set off, see *James Young v Bank of Bengal* *supra* *Miller v*

Beer, 6 C L R 294 (A right of set-off not existing at the date of the adjudication order cannot be acquired afterwards), *Dickson v Evans*, (1704) 6 T R 57, *Comp Collins v Jones*, (180) 10 B & C 777. From what has been said above it will be seen that in order to constitute a set off, the respective debts should be (1) ascertained, (2) legally recoverable and (3) literally mutual and involving no variation in the character of the parties.

A question of some interest arises in connection as to whether the rule of set off enacted herein can be excluded by agreement between the parties as regards their respective debts. In *Clarke v Fell*, (183) 1 B & A 404, a certain creditor of the bankrupt made over to the latter, before his bankruptcy, a stanhope for repairs agreeing to pay ready money, but before the repairs were completed, bankruptcy ensued, and the creditor demanded the stanhope from the receiver proposing to set off the cost of repairs as against the money owing to him from the bankrupt. But the Court negatived this claim for set off, because of the agreement to pay ready money. Similarly, the case of *James Young v Bank of Bengal*, *supra*, also seems to suggest that the effect of this section can be excluded by agreement. We have seen above that where money standing in the hands of a person is ear-marked for a specific purpose, its surplus or unapplied portion should be restored or refunded to the person who brought that money and cannot be put in mutual accounts or subjected to set off, see *In re Pollitt*, (1893) 1 Q B 455. The section does not, however, read as if it were subject to any agreement between the parties, and the trend of modern opinion seems to mark a departure from the view taken in *Clarke v Fell* or *James Young v Bank of Bengal*, [Cf *M Gillivray v Simpson*, (1826) 9 B & C 746, *Ex parte Barnett* (1874) 9 Ch App 293].

Accounts In order to allow set off accounts between the parties should be first taken, *Palmer v Day*, (1805) 2 Q B 618, *Re Daintrey Ex parte Mant*, (1900) 1 Q B 540. As to up to what date the accounts are to be taken *vide supra*. See also *Ellis & Co v Dixon*, (1924) 2 Ch 451 (1925) A C 489 01 L J (Ch) 221 (a case of mortgage of shares with the bankrupt), *supra*.

Creditor The section uses the word "creditor" in a general sense, so as to cover the case of a secured creditor, *Ex parte Barnett*, (1874) L R 9 Ch App 293.

Appeal An original order of the District Court disallowing a set off is appealable only by leave, *Salimamma v Valli Hussanabha*, 11 I C 653.

47. [§ 31] (1) Where a secured creditor

Secured creditors

realises his security, he may prove for the balance due to

him, after deducting the net amount realised

(2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt

(3) Where a secured creditor does not either realise or relinquish his security he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security and the value at which he assesses it and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed

(4) Where a security is so valued the Court may at any time before realisation redeem it on payment to the creditor of the assessed value

(5) Where a creditor after having valued his security, subsequently realises it the net amount realised shall be substituted for the amount of any valuation previously made by the creditor and shall be treated in all respects as an amended valuation made by the creditor

(6) Where a secured creditor does not comply with the provisions of this section he shall be excluded from all share in any dividend

The Section This is section 31 of the Act of 1902. It deals with the rights of a secured creditor in relation to his security and his right to prove his debt for the purpose of participating in the insolvent's assets. The section is based on the general principle that a man cannot prove in bankruptcy against an estate and at the same time retain his security thereon which if given up would go to augment the estate see (1881) 19 Ch D 105. It should not however be lost sight of that this section applies only to a man who is *unprofitably* a secured creditor but where the alleged charge is itself in question that point must first be decided before this section can be put in operation. *Motiram v Rodell* 11 A L J 32 A I R 1923 All 159. To the extent of the security, the bankrupt is virtually not the owner of the property and there-

fore to that extent, the receiver has got nothing to do with the property Cf *Richardson, In re*, (1911) 2 K B 705

Rights of a secured creditor The following courses are open to a secured creditor [*Sant Prosad v Sheodutt* 2 Pat 724 A I R 1924 Pat 259 77 I C 589]

- (a) He can rely on his security and may not have recourse to proof
- (b) He may realise his security and may prove for the balance if any ,
- (c) He may surrender his security and prove for the whole debt
- (d) He has the option of assessing his security at a particular value and can then prove on the balance But in this case he takes the chance of being redeemed at the assessed value See *Union Bank of Bijapur v Bhimrao* 31 Bom L R 463 A I R 1929 Bom 258 119 I C 189, *Société Generale De Paris v Green*, (1883) 8 A C 606 (621)

"A secured creditor may not petition for adjudication of an insolvent unless he is willing to relinquish his security for the benefit of the general body of creditors or gives an estimate of the value of his security, and in the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated" *Bank of Upper India v Administrator General of Bengal*, 45 Cal 653 (664) A secured creditor who has the advantage of security may remain outside the Act To the extent to which he relies on his security he will reduce the estate of insolvency But he obtains at first no part in the dividend and is unaffected by the proceedings Should however the amount of realisation be less than the amount due to him he is given the special privilege of proving for the balance This balance is the difference between the decretal amount and the amount realised When he has proved he will not obtain any more than his proportionate share in the estate He will then be put on the footing of an unsecured creditor, *Sharafuzzaman v Hunter*, 6 O W N 982 Whether he should sit on his security or claim to prove is particularly a matter for his election, and participation in the dividend is conclusive as to his final election *Moor v Anglo Italian Bank* (1879) 10 Ch D 681 (600) Where the mortgagee desires that the mortgaged property of the insolvent mortgagor should be sold free from the mortgage rights and the mortgage debt should be recovered from the sale proceeds the Insolvency Court is competent to accede to his request, *Gopal Gunaji v Balaji*, A I R 100 Nag 196 122 I C 224

\ B The position of the secured creditor is not affected by the insolvency proceedings, *Moti Ram v Rodewell*, 21 A L J 32 A I R 1923 All 159, *Sant Prosad v Sheo Dut*, 2 Pat 724 See also the cases referred to at pp 199-201, *ante* It is not necessary for him to prove in insolvency, *Bapuji v Tansa*, A I R 1930 Nag 17 The fact that a creditor gives up his security and agrees to treat himself as an unsecured creditor for the amount due to him is not conclusive on the question that the money was not due as a personal debt, *Kumaraswami v Venkata Sami*, 46 M L J 242 (1924) M W N 212 19 L W 193 A I R 1924 Mad 830 78 I C 857 If the insolvent's assets are distributed by mistake in ignorance of the claims of a secured creditor, such creditor can ask the Court to give directions for bringing back to Court the money distributed as dividends for satisfaction of his prior claim, *K P S P P L Firm v C 4 P C Firm*, 7 Rang 126 A I R 1929 Rang 168 117 I C 582

Secured Creditor For definition of the term see sec 2 (1)—(c) *ante* and the cases referred to at pp 18 19, *ante* Under the said definition the 'secured creditor' must hold a mortgage, charge or lien on the property of the debtor, so where the security is on the property of a third person the holder of the security does not become a secured creditor simply because the security is for a debt due from the debtor himself, *Ex parte West Riding Union Banking Co*, (1881) 19 Ch D 105 A simple mortgagee (*i e* without possession) is just as much a secured creditor as a mortgagee with possession, *Shew Singh v Ishar Das*, A I R 1927 Lah 904 103 I C 398 (1) Also see the English cases at p 45 of Halsbury's *Laws of England*, Vol II, also *vide* the notes under sec 9, *ante* at p 83 The creditor of the ancestor of a Mahomedan insolvent is not a secured creditor, and must prove as an ordinary creditor, see A I R 1929 Mad 609, cited at p 20, *ante* Where rent is a charge on the leasehold property, the landlord becomes a secured creditor Cf *Chandra Narain v Kishen Chand*, 9 Cal , 855, *Chinna v Kudaswami* 1 Mad 59, *Bishambhar v Rukha*, 81 I C 647, cited at p 19, *ante* As to the position of an equitable assignee, see *Palmer v Carey* 95 L J P C 146 (1926) A C 703—cited at p 176, *ante* The secured creditor is entitled to interest at the contractual rate up to the date of payment, *Jugal Kishore v Bankim*, 41 All , 481, *infra* Cf 2 Rang 197 83 I C 576

Sub-section (1) : Realises his security The secured creditor is not affected by the order of adjudication, that is, he can stand outside the bankruptcy, (1915) 2 Ch 345 (360), so, notwithstanding such order he can realise or otherwise deal with his security, see sec 28 (6) and *Badri Das v Chetty*, 45

IC 918 There is no obligation on him to give up his security. *In re Shib Chunder*, 8 B L R 30, that is, he has the option to sit upon his security, *Re Sarin*, (1872) 7 Ch App 760. So under this section he can realise his security and can prove for the balance, if any, due to him. Cf *Sridhar v Almaram*, Bom 455, *Harapriya v Shyama Charan*, 16 Cal, 592, *Sheoraj v Gauri Sahay* 21 All, 227, *Baranashu v Bhabadeb*, 34 C L J 167. 66 IC 758, *Sridhar v Krishnaji*, 12 Bom, 772, *Bank of Upper India v Administrator General, Bengal*, 45 Cal, 631, *Labulal Sahu v Krishna Prasad*, 4 Pat 128 AIR 1925 Pat

Secured creditor's
right to interest

438 85 IC 543 As to up to what date interest is to be taken into account see *Quartermaine's case* (1892) 1 Ch 639, vide notes under sec 48, *infra*.

Where a secured creditor realises his security, his proof must be limited to the amount due for principal and interest up to the date of adjudication after deducting the amount realised. *Ibid* see also *Re Fox & Jacobs* (1894) 1 Q B 438 (cited at p 203, *infra*) (Interest stops at adjudication, only where the secured creditor seeks the assistance of the Bankruptcy Court and claims to prove). *Re Sarin* (1872) 7 Ch App 760. Comp *Ram Chand v Bank of Upper India* 3 Lah 59 AIR 1072 Lah 281 so assumed). (But the case is otherwise where the Receiver seeks to redeem the secured creditor, in this case the latter can insist on his entire interest up to date). *Ibid* also *Re Sarin supra Jugul Kishore v Bankim* 41 All 481 1 ALJ 480 51 IC 192, see notes under the heading 'secured creditor' at p 297 *post* and Robson on Bankruptcy 7th Ed p 350. Henley's Digest of Bankrupt Laws, 3rd Ed p 290. By realisation of security are meant the sale of the property and the appropriation of the sale proceeds. *Jugal Kishore v Bankim* 41 All 481 17 ALJ 480 51 IC 192. *Ex parte Leads Leads* 6 Ves 644. *Vide* also the notes and cases at pp 199 200 *ante*. This sub-section contemplates the case where the amount realised is insufficient to cover the entire amount due to the secured creditor. Where the secured creditor realises more than what is due to him he is bound to make over the surplus to the receiver. *Ex parte King* (1875) 1 K 20 Eq 273. In order to ascertain the exact amount still due to him the net amount realised may be deducted. The word *net* perhaps indicates that the costs of realisation may first be deducted from the amount realised. Cf *Ex parte Carr, Re Hoffman* (1876) 11 Ch D 67. It is not quite clear up to what date the calculation is to be made, we are apt to think that such calculation can be made up to the date of realisation.

A secured creditor can if he so wishes, obtain a decree under O XXXIV, r 6 and utilise the same as proof of the balance. But it is not necessary for him to take such a course.

Even, if his application for a decree under O XXXIV, r 6, is refused it is still open to him under the special remedy provided by this section to prove for the balance due. Under this special provision no question of limitation arises, and he will be placed on the footing of an unsecured creditor. *Sharafuzzaman v Hunter*, 6 O W N 982. As for further decrees under O XXXIV, r 6 of the C P Code, *vide* at

p 181, *ante*. When a mortgagee has already instituted a suit for the realisation of his security and there after, the receiver starts a proceeding under sec 5, of this Act challenging his security, the proper course will be for the receiver to apply to the Civil Court having seisin over the mortgagee's suit to stay the same, pending the disposal of the proceeding under sec 53, *Official Receiver, Coimbatore v Palani Sanni Chetti* 48 Mad 750 49 M L J 203 (1925) M W N 67- 88 I C 934.

Mortgagee's suit : Receiver a necessary party *vide* notes and cases at p 201 *ante*. Where no Receiver is appointed, the mortgagee can ask the Insolvency Court to appoint one, failing which it will be open to the mortgagee to implead the Judge in whom the estate vests under secs 28 and 58) as a party defendant.

Sub-sec. (2) When a secured creditor seeks to prove against the insolvent estate, he must *give up* the security, which if not retained by him, would go to augment that estate, *Ex parte Manchester, Liverpool D Banking Co* (1924) 2 Ch 199. The principle applies only to the debt sought to be proved and does not apply to a case where the security is for a different debt, *Ibid*. The word "relinquish" has been substituted in the place of "give up" in the English Act. The relinquishment of security enures for the benefit of creditors and not for the benefit of a secured mortgagee, *Cracknall v Janson*, (1877) 6 Ch D 735. So a mortgagee by giving up his security does not alter the rights of prior or subsequent mortgagees, but simply puts the trustee in his place, *Ibid*. The insolvent's assets are, however, augmented by the relinquishment. Cf *Bell v Sunderland Building Society*, (1883) 24 Ch D 618. The relinquishment is a voluntary matter, there is no obligation upon the secured creditor to give up his security see *In re Shub Chunder* 8 B L R 30. Where the receiver gives notice to the mortgagee asking permission to sell the property free from incumbrance, mere silence on the part of the latter will not amount to relinquishment, *Kaniappa Mudiliar v Raja Chettia*, 47 Mad 605 47 M L J 16 20 L W 45 (1924) M W N 520 79 I C 850. Thus, there is no relinquishment by implication or conduct, *Ibid*. But the Bombay High Court

is of opinion that the term "relinquish" in this section is sufficient to cover an abandonment by conduct, *Union Bank of Bijapur v Bhimrao*, 31 Bom L R 463 A I R. 1929 Bom 258 119 I C 189 Thus, proving a debt without falling back on the shares held as a security, may be tantamount to relinquishment, *Ibid* The expression "his debt" in this sub-section means the secured debt or the debt of the secured creditor as such and does not cover an unsecured debt of that creditor So, where a creditor has several debts against a debtor, some of which are secured and others unsecured the creditor can prove the *unsecured* debts without relinquishing his securities for the other debts, *Ex parte Manchester and Liverpool D Banking, supra*

Sub-sections, (3), (4) and (5) . Under this section the secured creditor has a right to elect to realise or relinquish his security In the absence of an election by him hereunder, the Court cannot direct the Receiver to take possession of his security and sell it, allowing the creditor to rank first as to priority, *Sant Prasad v Sheodutt*, 2 Pat 724. A I R 1924 Pat 259 77 I C 589 Without the consent of the mortgagee, the Court cannot sell the property free from his mortgage, *Gopal Gunaji v Balaji*, A I R 1930 Nag 196 122 I C 374 Where the secured creditor does not either release or relinquish his security, he must, while proving his debt, state the particulars of his security and must assess it at a particular amount, and if there still be a balance due to him after deducting such assessed amount he can prove for it, and can receive a dividend in respect of it Cf *Baranashi v Bhabader, supra*, but the Court has an option to redeem him at the assessed amount before he realises his security, under sub-sec (4) Where the Court does not so redeem him, he can realise his security, and then the net amount realised will be substituted in the place of the assessed value See sub-sec (5) See *Gopinath v Guruprasad*, 15 I C 860 *Sant Prasad v Sheodutt, supra*, *Babu Lal v Krishna Prasad*, 4 Pat 128 A I R 1925 Pat 438 85 I C 543 Subject to the consequence indicated in this section, a secured creditor has absolute freedom in assessing his security at any figure he likes In England the law on this point is somewhat different from that under this Act There, once the creditor has committed himself to a figure by way of assessment he must stand by it and any amount realised by him in excess over that assessed value must go to the Receiver, *Ex parte King*, (1875) L R 20 Eq 273 And if the amount realised should fall short of the assessed value, he will have no remedy for such deficit, *In re Hopkins*, 8 Ch D 378 But there is no such risk under this Act, because the amount realised can be

substituted in the place of the assessed value and the original assessment will then be looked upon as having been amended to the extent of realisation see sub sec (5) The only risk of assessment under sub sec (4) is that the secured creditor is liable to be redeemed at his assessed value under sub sec (4) It is only for the purposes of redemption by Court that the secured creditor is bound by his estimate Cf *Ex parte Taylor In Re Lacey* (1884) 13 Q B D 128 *Re Lautin* (1898) 2 Q B 549 There is no time limit for such redemption but such redemption should take place before realisation

These sub sections apply where the security is the sole property of the debtor *Ex parte Bennett* 2 Atk 578 *Ex parte Parr* 18 Ves 63 and not where it is not the debtor's sole property *Ex parte H R B Co* 19 Ch D 105 As to whether the valuation once made can be amended the Act does not clearly say anything but under the English cases where the valuation is made through inadvertence amendment may be allowed otherwise not *Re Rowe* (1904) 1 Q B 89, but no amendment can be allowed when a composition has already been entered into on the faith of the first valuation *Couldrey v Bartrum* (1880) 19 Ch D 394 Cf *Ex parte Arder* (1884) 14 Q B D 121 Amendment is also permissible where under valuation has resulted from *bona fide* mistakes or where there has been a rise in the value of the security since the first valuation *Ex parte Norris* (1886) 1 Q B D 28

Sub section (6) This sub section provides a penalty for non compliance with the provisions of this section It says that in case of such non compliance the secured creditor is excluded from all share in the dividend He will then have to rely exclusively on his security and not on proof *Gopinath v Guruprosad* 15 IC 860 That is a disregard of the section is punished only with exclusion from proof and not with forfeiture of security See the following cases *Ex parte Good* (1880) 14 Ch D 82 *Moor v Anglo Italian Bank* (1879) 10 Ch D 681

Restrictions on the rights of a secured creditor — A secured creditor cannot receive payment of his debt from his debtor and hand over the securities after he becomes aware of the commission of an act of bankruptcy by the debtor *Ponsford Baler & Co v Union of London & Smiths Bank Ltd* (1906) 3 Ch 444 overruling (1902) 2 KB 445

48. [§ 32] (1) On any debt or sum certain whereon interest is not reserved or agreed for, and which is overdue when the debtor is adjudged an insolvent and which is provable under this Act the creditor

Interest

may prove for interest at a rate not exceeding six per centum per annum—

- (a) if the debt or sum is payable by virtue of a written instrument at a certain time from the time when such debt or sum was payable to the date of such adjudication; or,
- (b) if the debt or sum is payable otherwise, from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment to the date of such adjudication

(2) Where a debt which has been proved under this Act includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding six per centum per annum, without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full

This is sec 32 of the Act of 1907, and corresponds to sec 66 (1) and Sch II (21) of the Bankruptcy Act, 1914

Sub-sec. (1) : Interest . Where no interest is reserved or agreed for any debt which is overdue on the date of adjudication, the creditor can prove for interest at a rate not exceeding 6 p c p a , (a) if the debt is payable by virtue of a written document on a certain date, such interest will be for the period between the due date and the date of adjudication , (b) if the debt is otherwise payable, the interest will be for the time between the date of demand for interest and the date of adjudication

It is to be noticed that both the clauses (a) and (b) allow interest up to the date of adjudication only This is in accordance with the general rule that a creditor cannot prove for interest accruing due after an adjudication ; see *Ex parte Lubbock*, 4 De G J. and S 416 , *Quartermaine's case*, (1892) 1 Ch 639 This general rule rests

on this foundation that upon insolvency the debtor ceases to be *sui juris* for the purpose of satisfying his obligations and his contracts stop as a matter of legal right and the Insolvency Court intervenes as a Court of Equity to do equal justice to all his creditors by enforcing an equitable distribution of his property in discharge of his obligations, *Re Sarin* (1872) L R 7 Ch App 760, see also *Ex parte Bath Re Phillips*, (1883) 27 Ch D 500, (1882) 22 Ch D 450 "The theory in bankruptcy is to stop all things at the date of bankruptcy and to divide the wreck of the man's property as it stood at that time. Directly the insolvent files his petition and a vesting order is made he is divested of all his property and he ceases to be *sui juris* for the purpose of satisfying his obligations and the Insolvency Court intervenes as a Court of Equity to do equal justice to all his creditors by enforcing an equitable distribution of his property in discharge of his obligations as they stood at the date of the petition and the vesting order. I take the general rule then to rest on this foundation, viz, that the contracts of the insolvent stop at the date of the vesting order as a matter of legal right and the Insolvency Court becomes seised of jurisdiction to deal with his property towards their satisfaction through the Receiver as a Court of Equity and according to equitable rules of distribution," *per James L J* in *Re Sarin*, *supra*. The chance of there remaining a surplus must not be made a ground for not acting upon the said general rule as embodied in this section, *Subbarayalu v Roulandson*, 14 Mad, 133. If there be any surplus after the payment of the debts, it may be utilised, under sec 61 (6), for the purpose of paying interest on all the scheduled debts from the date of the order of adjudication. Where an insolvent's estate is sufficient to pay off his creditors in full, leaving a balance in the hands of the Official Assignee, the Court can direct payment of interest subsequent to the date of adjudication at the rate of 6 p c p a, see *Re Mahomed Shah* 13 Cal, 66.

The section is also an extension of the power which a Court of Bankruptcy, as a Court of Equity, possesses in regulating interests on debts due from the insolvent. It has been a recognised principle that when the interest is "harsh and unconscionable", the Court of Bankruptcy has power to give relief by reducing the amount of interest, *In re a Debtor*, (1903) 1 K B, 705. The Indian Courts, too, have recognised this principle. So in a recent case, the Court refused to apply the rule of *Damdupat* to insolvency proceedings *Re Harilal Mullick*, 33 Cal, 1269 10 C W N 884. In another case commission in the nature of interest was disallowed as too high, *Subbarayalu v Roulandson* 14 Mad, 133 (136).

The English rule that interest stops at Bankruptcy has no application to the case of mortgagee from an insolvent

Therefore, as a secured creditor, he is entitled to receive out of the sale proceeds from the mortgaged property his principal, interest and all costs, and he is also entitled to interest up to the date of payment, *Jugal Kishore v Bankim Chandra*, 41 All 481

Written instrument The debt must be payable by virtue of a written instrument. So an application for loan—though the loan is granted on such application—is not such an instrument, as the debt is not payable under it, see *Taylor v Holt*, 5 H & C 451. Bonds and mortgages have been held to be written instruments, *Ferquehar v Morris*, 7 TR 121, *Ashwell v Staunton*, 30 Ben 52. Similarly, a certificate of the Administrator General admitting a debt to be due is not such a written instrument, as the debt is not payable by virtue of the said certificate, *Omratanath v Administrator General* 25 Cal, 54 Comp sec 1 of the Interest Act (XXII of 1839)

Demand—The demand under clause (b) of sub sec (1) should be in writing. Under the English law, it should also specify an ascertainable or liquidated sum, it is not enough if only 'a good round sum' or such vague amounts are mentioned *Geake v Ross*, 32 LT 666 44 LJCP 315, but under the present Act it appears to be sufficient compliance with the provisions of this section if the creditor gives notice that he claims interest from the date of demand. Cf *Ra ulha v Muthu Koundan*, 23 Mad, 41, also 20 Mad, 481

B—This section will not apply to the mode of calculating interest on a debt due to the insolvent from his debtor. So the insolvent's debtor is bound to pay full interest according to the contractual rates see *Firm of Kanhya Lall v Seth Radha Kissen* 10 PLR 1913 92 PWR 1913 18 IC 203

Damdupat The rule of *damdupat* does not apply to insolvency proceedings. *In re Harilal Mullick* 33 Cal, 1269 10 CW 884 *supra*

Secured Creditor: A secured creditor can claim interest at the contract rate beyond the date of adjudication of the insolvent and up to the time of realisation, *Re Bulallal Sageermal* 2 Rang, 197 AIR 1924 Rang 352 83 IC 5-6. See also *Jugal Kishore v Bankim*, 41 All 481. Vide also notes pp 285 86, ante

Sub-Section (2) Sub section (1) contemplates the case which reserves no interest or where there is no agreement for interest. This sub-sec (2) covers the case where the debt proved includes also interest or consideration in lieu of interest. The other point is worthy of note. Sub sec (1) affects the creditor's right to prove for interest, but sub sec (2) affects his right only as to dividend and not in respect of proof, because the debt (including the interest) is already proved.

Cf *Re Herbert*, 9 Mor 253 This is also clear from the latter part of the sub section, which empowers him to receive the full interest *proved* in the event of full payment of all the debts

The right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled is not prejudiced after all the debts proved have been paid in full, *Muhammad Ibrahim v Ram Chandra*, 48 All , 272 24 A L J 244 (247) A I R 1926 All , 289—92 I C 514 For subsequent interest, *vide Ibid* Under this sub section the rate of interest for the purpose of dividend cannot exceed 6 p c *per annum*, *M K Bank v Mamu*, 39 I C 373 3 P W R 1917 19 P L R 1917 It is not open to an Insolvency Court to allow interest at a rate higher than six per cent after the date of adjudication, *Ganga Sahai v Mukaram Ali*, 24 A L J 441 A I R 1926 All 361 97 I C 556

N B This section does not prevent a *secured* creditor who has realised or assessed the value of his security, from allocating such value in discharge of the interest and proving for the principal or balance due to him, *In re Fox and Jacobs*, (1894) 1 Q B 438

49. [§ 25] (1) A debt may be proved under this Act by delivering, or sending by post in a registered letter, to the Court an affidavit verifying the debt

(2) The affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers (if any) by which the same can be substantiated The Court may at any time call for the production of the vouchers

This is section 25 of the Act of 1907 Cf Rules 2 and 4 of Schedule II of the Eng Bankruptcy Act, 1914 The Legislature considered the English practice of proving by transmission of an affidavit by post desirable and in order to safeguard the procedure, enacted the provisions of sec 50 see Viceregal Council Proceedings to Act III of 1907

This section lays down how a debt can be proved under this Act It should be noted that this section does not prescribe the *only* mode of proof This is clear from the use of the word *may* The words "a debt may be proved" go to show that this section provides for an *optional* additional and convenient method of proof while only specifying a simple mode of proof the section does not exclude other modes of proving a debt Cf *Krishna Chandra Das v Jotindra N Porial* 48 C L J 574 A I R 1929 Cal 159 114 I C 415

In section 33 (1) we have seen that a creditor is to tender proof of his debt by *producing evidence etc*. There the word 'evidence' is used in a general sense and this section (sec 49) gives the creditor an option to have recourse to the particular sort of evidence contemplated herein, namely by producing an affidavit. In *Krishna Ch Das's case, supra*, it has been opined that an admission by the insolvent in his schedule of a debt due to his only creditor is sufficient proof of the debt. This case evidently makes a confusion between, *relevancy, production of evidence and proof*. An entry of the debt in an insolvency petition may be relevant as an admission and may be produced as judicial evidence and may ultimately be regarded as proof but to call it *proof per se* before compliance with the rules of the Evidence Act and the provisions of secs 33 and 49 of this Act is going rather too far.

The **Affidavit** may directly be filed in Court or it may be forwarded under a registered cover. The affidavit should contain particulars of the debt and should specify the vouchers (if any). The Court can direct production of the vouchers if necessary. (In case of decretal debts, a certified copy of the decree should be filed along with the affidavit.) The fact that a debt is covered by a decree does not attach any special sanctity to it in an Insolvency Court, because an Insolvency Court has power to go behind a judgment debt, *vide notes at p 217 ante*. This position is not very much appreciated by our Courts as will appear from *Krishna Ch Das's case, supra*. Cf *Re Archibald Gilchrist Peace* 26 CWN 65. A creditor who lodges his proof in the statutory form is entitled that it should be dealt with without doing anything more, *ibid*. Cf *Re Halsins* 64 I JQB 373 (1895) 1 QB 404. The section does not say by whom the affidavit is to be sworn. But having regard to the provisions of the Code of Civil Procedure it seems it can be sworn by the creditor himself as well as by any body acting on his behalf, if fully cognisant of all the circumstances sworn to. If the affidavit is defective, it should not be rejected but allowed to be rectified. As to the form of the Affidavit see Civil Process No 146 under the Rules of the Calcutta High Court.

Cost of proof The Provincial Insolvency Bill of 1906 contained the following provision: "A creditor shall, unless the Court otherwise directs, bear the cost of proving his debt." This accords with Rule 6 of the Eng Bankruptcy Act 1911 but has been omitted from the present Act. So it seems that such amount can be added to the amount of claim.

Proof by secured creditor The affidavit must state whether the creditor is or is not a secured creditor. See Rule 5 in Sch II of the English Bankruptcy Act 1914. In this

connection *vide* also the notes under sec 47, *ante* As to the secured creditor's right to interest, *vide* notes at p 285

Failure to prove By reason of omission to prove in accordance herewith, the creditor is estopped from proving any more in bankruptcy and from participating in the dividend, and is thus deprived of his rights in respect of his debts See *Re Hickham* 34 T L R 158, *Irshad Hussain v Gopinath*, 41 All, 378 17 A L J 374 49 I C 590 The law in this respect under the Insolvency provisions of the C P Code, 1882, was different, see sec 352, thereof and *Harapriya v Shama Charan*, 16 Cal 594

50. [§ 26] (1) Where the receiver thinks

Disallowance and reduction of entries in schedule

that a debt has been improperly entered in the schedule the Court may, on the application of the receiver and, after notice to the creditor, and such inquiry (if any) as the Court thinks necessary expunge such entry or reduce the amount of the debt

(2) The Court may also after like inquiry, expunge an entry or reduce the amount of a debt upon the application of a creditor where no receiver has been appointed or where the receiver declines to interfere in the matter or, in the case of a composition or scheme, upon the application of the debtor

This is sec 26 of the Act of 1907 Cf Rules 24 and 26 of Schedule II of the English Bankruptcy Act, 1914

Scope of the Section —The section authorises the Receiver to apply for expunction of debts wrongly entered by the insolvent in his Schedule see *Bauajeer v Baua Rangsami* 36 Mad 402 12 M L J 52 12 I C 618 There is nothing in this section to justify the view that any question of title raised between two scheduled creditors can be decided by the Insolvency Court, the decision of the executing Court under O XXI, r 58 C P Code, is final *Peareylal v Allahabad Bank* 24 A L J 334 A I R 1926 All 244 92 I C 14 It is worthy of notice here that the section does not make any distinction between a secured or unsecured debt Cf *Dronadula v Ponakavira*, 45 M L J 105 72 I C 805

Power to expunge or modify proof This section is analogous to rules 24 & 26 in the Second Schedule of the English Bankruptcy Act 1914 The object of this section is

to invest the Court with the power of expunging proofs or reducing the amounts of debts entered therein. An enquiry under this section should be made by the Court and should not be delegated to the Receiver, *Satrasala v Talisetti* (1921) M W N 109 13 L W 145 61 I C 767, *Muthuswami Chettiar v Official Receiver of North Arcot*, 51 M L J 287 (10 6) M W N 935 A I R 1926 Mad 1019 97 I C 407. The section gives no power to the Receiver himself to expunge a debt, *Ibid* (51 M L J 287 97 I C 407). 'The framing of the Schedule is the duty of the Court, not of the Receiver' per Teunon J in *Behary Lal v Harsukh Das*, 25 C W N 137 61 I C 904. An Insolvency Court cannot add or remove a name from the schedule without judicially determining the question in the presence of the parties or upon proper notice to them. *Amir Chand v Anukul Chandra* A I R 1926 Cal 160 90 I C 802. Also see Robson, p 387.

An error in the schedule cannot however be rectified after all the proceedings have been closed and the aggrieved party has exhausted all his remedies. *Ram Chander v Ma har Hussain* 51 I C 55 (All).

Sub-sec (1) : Application of the Receiver It seems that the Court can exercise the power vested in him under this section only on application of the receiver under Sub sec (1) or on the application of the creditor or debtor under special circumstances, see sub-sec (2). There must be some application and the Court cannot proceed *suo motu*. If the Receiver thinks that a debt has been improperly entered in the Schedule he may apply to the Court to expunge such entry or reduce the amount. *Imhed Haji Dossal v Mackenzie Stuart* A I R 1918 Sind 40 105 I C 366. There is no time limit for the purpose of such an application, so it has been held that lapse of time is no bar to an application by the receiver to expunge proof, *Ex parte Harper Re Tail* (1882) 21 Ch D 537, *Ex parte Merriman*, (1883) 25 Ch D 144. *Ex parte Bacon Re Bond* (1880) 17 Ch D 44. But if any dividend is paid before the proof is expunged the creditor is not bound to refund it. *Ex parte Harper Re Tail supra*. *Ex parte Lennox* (1885) 16 Q B D 315.

Improperly In an early case it was held that the Court has no power to expunge the name of a creditor, where no fraud is proved or alleged in regard to his claim. *In re De Curn Jearay* 12 Bom, 34. That is to say, formerly a Court's power to expunge or reduce debts was limited to cases of fraud but under the present Act the word 'improperly' gives a wider power to the Courts, now, not only the fraudulent entries are to be expunged or reduced but all improper, wrong and

unjustifiable entries are to be expunged. Thus, the inclusion of a barred debt, not fraudulently but unknowingly made, may be improper within the meaning of this section to render the amount liable to disallowance or reduction. The validity of a creditor's debt may be challenged by another creditor, *Khusali Ram v Bholar Mal*, 37 All, 252. A debt unconditionally released should go out of the schedule, *In re Keel*, Cf (1905) 2 K B 666. An entry is not improper within the meaning of the section, because the creditor in question is a corporation which has been subsequently dissolved, *Re Higginson*, (1899) 1 Q B 325. The mere fact that the schedule was prepared by the Official Receiver will not preclude the Court from entertaining an application under this section, see 41 Mad 30, *infra*.

Court's power to go behind a judgment Debt *Vide* notes at p 21, *ante*

Notice Before taking action under this section, the Court should cause a notice to be given to the creditor intended to be affected, it is a cardinal principle of law not to permit any order being passed without giving any previous notice to the person likely to be affected thereby. See notes at pp 116 17 and p 222. If no notice is given to the creditor, his rights remain unaffected. See also *Amir Chand v Inulul Chandra*, AIR 1926 Cal 160 90 IC 802.

Receiver For the powers of an Official Receiver, see sec 80 (1) (b), *post*. The Official Receiver in framing a schedule of creditors does not decide, judicially or finally, upon contested claims, and therefore the framing of a schedule by him will not oust the jurisdiction of the Court to expunge entries therefrom, *Khadir Shau v Official Receiver, Tinnevely*, 41 Mad 30 45 IC 67.

Mode of taking evidence for the purposes of this section The section contemplates a *judicial* enquiry, [see *Khadir Shau's* case], therefore the usual judicial procedure for recording evidence should be followed. The Court cannot direct the Receiver to take evidence for the purposes of an enquiry by the Court on an application for expunging certain entries of debt under this section. The evidence of the insolvent given in his public examination under sec 24 is not relevant evidence in an enquiry under this section, *Satrasala Hanumanthu v Teliseti Subbayyar*, 13 L W 145 (1921) M W N 109 61 IC 767, but see *Amir Chand v Inulul Chandra*, *supra*, in which the Court has been considered not to be precluded from relying on the evidence recorded by the Receiver.

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Application not barred by lapse of time (1882) 21 Ch D 537, *Ex parte Merriman* (1883) 25 Ch D 144. *Ex parte Bacon Re Bond* (1880) 17 Ch D 447. But if any dividend is paid before the proof is expunged, the creditor is not bound to refund it. *Ex parte Harper, Re Tail, supra*, *Ex parte Lennox* (1885) 16 Q B D 315.

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Sub-sec. (2) The application to expunge proof may also be made by the creditor (i) where no receiver is appointed or (ii) where the receiver declines to

Creditor's right to amend schedule interfere in the matter. The creditor's application upon the Receiver's refusal to interfere is not an appeal against the receiver's order under sec 68 so, such an application is not subject to 21 days' rule of limitation prescribed in that section. *Ramasami v Venkataswara* 42 Mad 12 35 M L J 531 48 I C 952. The application can also be made by the debtor where there is a composition or scheme.

Insolvent's right to amend schedule Ordinarily the debtor has no *locus standi* to challenge the accuracy of the entries in the schedule, but this sub

section furnishes the only exception to that rule, *Ganga Shai v Mukarram* 24 A L J 441 A I R 1926 All 361 97 I C 556. For the debtor's motion for reduction see *Re Colert* (1890) 80 L T 268. It seems that the insolvent can apply to the Court by way of appeal under sec 68 against an order of Receiver admitting proof of debt see *Inandji v James Finlay* 62 I C 441. When the application is made by the creditor, it must be on his own account and *bona fide* if it is made on behalf of the debtor, the Court will dismiss the application. *Ex parte Merriman*, (1883) 25 Ch D 144, *Re Tallerman* 5 Mor 119.

The insolvent can apply to the Court for amendment of the schedule only when a composition or scheme has been accepted. *Re Benoist* (1900) 2 K B 784.

As to the right of one creditor to impeach the debt of another creditor see also *Kusali Ram v Bholar Mal*, 37 All 252 13 A L J 220 28 I C 573. Cf 47 Mad 6-3, 72 I C 805 (Mad).

Like enquiry This sub section speaks of *like enquiry* and does not speak about any notice to the creditor. But it seems that the use of the words *like* and *enquiry* necessarily involves the conditions as to notice also.

Costs An unsuccessful party in a proceeding under this section may be made to pay the costs thereof, *Re Pilling* (1900) 2 K B 488.

Effect of reduction on dividend already paid If some dividend is already paid to a creditor and then his claim is reduced the Receiver will be entitled, according to circumstances either to claim refund or to stop payment of subsequent dividends to him till payments to other creditors are levelled up to his proportion, *Re Searle Horne & Co* (1921) 2 Ch 326. But Cf *Ex parte Bacon* 17 Ch D 447.

Appeal An appeal lies to the High Court under sec 5 (1) and Schedule I from an order disallowing or reducing entries in the schedule under this section. Cf *Ganga Sahai v Mukarram Ali* 24 A L J 441 A I R 1926 All 361 97 I C 556 (*supra*). Any party prejudiced by an order disallowing or deducting an entry in the schedule can appeal as a matter of right *Ibid*. It should be noticed that every order in a proceeding under this section is not appealable under Sch I. Unless the order directs an expunction or reduction, there is no appeal under the said schedule ✓

Effect of insolvency on antecedent transactions

51. [§ 34] (1) Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the

Restriction of rights
of creditor under execu-
tion

execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition

(2) Nothing in this section shall affect the rights of a secured creditor in respect of the property against which the decree is executed

(3) A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver

This is sec 34 of the Act of 1907 and is based on sec 40 (1) of the English Bankruptcy Act 1914 as amended in 1926. See under "Change of Law" below.

Object of the Section is to protect the property of the insolvent against execution for the benefit of the general body of creditors. It is really intended 'to put the creditors of an insolvent who have not actually attached the property before the date of the admission of the petition in at least as good a position as creditors of the insolvent who but for his insolvency would have been entitled to claim a rateable distribution of the assets received on an execution sale'. *Kashinath v Kanharva Lal*, 37 All 452 13 A L J 700 29 I C 990. Cf Sec 73 of the C P Code. Also Cf sec 53 of the Presidency Towns Insolvency Act, (Act III of 1909). The policy of the section is to secure an even distribution of the insolvent estate among the creditors and to prevent the more a credi

from getting an undue advantage over the less active ones *Bowler v Hett*, (1895) 2 Q B 51. An adjudication of the debtor divests the rights of his decree holder as such and reverts him to the position of an ordinary creditor, *Sripal Singh v Hariram Goenka*, 26 C W N 739 (743), P C. One effect of adjudication is that the insolvent's creditors are treated *pari passu* with respect to his assets *excepting those actually realised before bankruptcy*, [see *Krishna Swami v Official Assignee* 26 Mad 673, *Jitmand v Ramchand*, 29 Bom 405], the exception being recognised to safeguard the fruits already earned by superior diligence, Cf *Tara Chand v Jugal Kishore*, 46 All 713 (715), *Gour Charan v Tojebuddin*, 23 C W N 461, *Ex parte Pillers*, (1881) 17 Ch D 653 (666). But for this equality of treatment, it would be quite possible for a creditor to steal a march over the other creditors. But this principle of treating the creditors *pari passu* does not apply to a case where a slice has already been cut out and appropriated by means of superior diligence in levying execution, *Cockerell v Dickens*, (1840) 3 Moo P C 98 2 MIA 353.

The section applies to a case where the decree is against a person against whom insolvency proceedings are pending and who has subsequently been adjudicated an insolvent. It does not apply to a case where the decree holder is adjudicated an insolvent *Firm Basheshar Nath v Bag Mal*, AIR 1929 Lah 805 120 IC 175.

The Section does not restrict execution The section puts a restriction on the rights of the creditors and does not take away the power of an Executing Court to execute its decree. So if the Court holds a sale in execution of the decree the same will not be invalid by reason of the bankruptcy though when apprised thereof it should follow the procedure prescribed by sec 52 below. See *Ralla Ram v Ram Labhaya*, 6 L L J 272 AIR 1925 Lah 158 80 IC 509.

Change of Law The words "the date of admission of the petition" are substituted in this Act in the place of the words, "the date of the order of adjudication" occurring in the old Act. The effect of this change is obvious. Under the Act of 1907, the Receiver had no right to recover the money realised by the decree-holder prior to the adjudication, *Muhammad Sharif v Radha Mohan* 41 All, 274 17 A L J 89 57 IC 760, but under the present Act he can recover such money if it is realised after the date of admission of the insolvency petition. Cf *Promatha Nath v Mohini Mohan*, 19 C W N 1700 31 IC 573, *Achambit Lal v Changa Mal*, 32 IC 479 (*infra*). This change has been introduced with the following note of the Select Committee (dated 24th September, 1919) "This clause is proposed to bring sec 34 into a line with

sec 53 of the Presi-towns Insolv Act, 1909 It has evoked considerable criticism particularly with reference to the difficulty of proving whether a creditor had notice of the proceedings or not We, therefore, propose to restrict the rights of creditors under execution to assets realised before the admission of a petition " As an interim receiver comes into existence only between the admission of the insolvency petition and actual adjudication the old cases giving preference to an executing creditor over him will now stand abrogated Cf *Basarmal v Khemchand*, 11 IC 433 (Sind)

Under the Act of 1907, for the purposes of sec 34, the order of adjudication was strictly construed and was not allowed to relate back to the date of presentation of the insolvency petition, Conflict of decisions under the old Act *Modhu Sardar v Kshitish*, 42 Cal 289

30 IC 82, *Sri Chand v Murari Lal*, 34 All 628 10 A L J 252 16 IC 183, *Achambit Lal v Changa Mal*, 18 OC 268 3 O L J 566 32 IC 429, *Basarmal v Khemchand*, *supra* *Patiram v Sheonath*, 1 P L J 235 1 P L W 46, 39 IC 246, and the result of this was that a purchaser at an auction between the dates of the insolvency petition and adjudication would acquire a good title to the insolvent's property against the receiver, *Din Dayal v Gursaran Lal* 42 All 336 18 A L J 28 59 IC 67 Or, in other words, this section was held not to be controlled by sec 28 (7) But the change introduced in the present section has undone the effect of those cases Vide also the notes at pp 201-02, ante

Sub-sec. (1) : Benefit of execution Under this section no person is entitled to the benefit of any execution of a decree issued against the property of a debtor as against the Receiver except where assets have already been realised in the course of the execution before the date of the admission of the petition Cf *Gour Charan v Toyebuddin* 23 C W N 461 This point of time should be taken note of as it is only the proceeds of an execution sale before that time that are excepted from the operation of this section, Cf *Srinivasa Naicker v Official Receiver South Canara*, A I R 1925 Mad 224 75 IC 172, *Lyon Lord & Co v Virbhandas*, A I R 1926 Sind 109 19 S L R 35 95 IC 205 The expression "date of the admission of the petition," occurring in sub sec (1) qualifies "assets realised," and therefore only assets realised before the date of the admission of the petition will enure to the benefit of the execution creditor *Ramanathan Chettiar v Subramania*, 48 Mad 656 47 M L J 259 A I R 1925 Mad 248 20 L W 872 85 IC 216 As the words "before the date of admission etc" do not go with the word "sale", it follows that even if the sale was before the date of the admission of the insolvency

from getting an undue advantage over the less active ones *Bowen v Hett*, (1895) 2 Q B 51. An adjudication of the debtor divests the rights of his decree holder as such and remit him to the position of an ordinary creditor, *Sripal Singh v Hariram Goenka*, 26 C W N 739 (743). P C one effect of adjudication is that the insolvent's creditors are treated *pari passu* with respect to his assets *excepting those actually realised before bankruptcy*, [see *Krishna Suami v Official Assignee* 26 Mad 673, *Jitmand v Ramchand*, 29 Bom 405], the exception being recognised to safeguard the fruits already earned by superior diligence, Cf *Tara Chand v Jugal Kishore*, 46 All 713 (715), *Gour Charan v Toyebuddin*, 23 C W N 461, *Ex parte Pillers*, (1881) 17 Ch D 653 (666). But for this equality of treatment, it would be quite possible for a creditor to steal a march over the other creditors. But this principle of treating the creditors *pari passu* does not apply to a case where a slice has already been cut out and appropriated by means of superior diligence in levying execution, *Colkerell v Dickens*, (1840) 3 Moo P C 98 2 M I A 353.

The section applies to a case where the decree is against a person against whom insolvency proceedings are pending and who has subsequently been adjudicated an insolvent. It does not apply to a case where the decree holder is adjudicated an insolvent, *Firm Basheshar Nath v Bag Mal*, A I R 1929 Lah 805 120 I C 175.

The Section does not restrict execution The section puts a restriction on the rights of the creditors and does not take away the power of an Executing Court to execute its decree. So if the Court holds a sale in execution of the decree the same will not be invalid by reason of the bankruptcy though when apprised thereof it should follow the procedure prescribed by sec 52, below. See *Ralla Ram v Ram Labhaya*, 6 L L J 222 A I R 1925 Lah 158 80 I C 509.

Change of Law The words "the date of admission of the petition" are substituted in this Act in the place of the words "the date of the order of adjudication" occurring in the old Act. The effect of this change is obvious. Under the Act of 1907, the Receiver had no right to recover the money realised by the decree holder prior to the adjudication, *Muhammad Sharif v Radha Mohan* 41 All, 274 17 A L J 89 57 I C 760, but under the present Act he can recover such money if it is realised after the date of admission of the insolvency petition. Cf *Promatha Nath v Mohini Mohan*, 19 C W N 1200 31 I C 573, *Achambit Lal v Changa Mal*, 32 I C 400 (*infra*). This change has been introduced with the following note of the Select Committee (dated 24th September, 1910) "This clause is proposed to bring sec 34 into a line with

sec 53 of the Presidency Towns Insolvency Act, 1909. It has evoked considerable criticism particularly with reference to the difficulty of proving whether a creditor had notice of the proceedings or not. We, therefore, propose to restrict the rights of creditors under execution to assets realised before the admission of a petition. As an interim receiver comes into existence only between the admission of the insolvency petition and actual adjudication the old cases giving preference to an executing creditor over him will now stand abrogated. Cf *Basarmal v Khemchand*, 11 IC 433 (Sind).

Under the Act of 1907, for the purposes of sec 34, the order of adjudication was strictly construed and was not allowed to relate back to the date of

Conflict of decisions under the old Act presentation of the insolvency petition, *Modhu Sardar v Kshitish*, 42 Cal 289

30 IC 82, *Sri Chand v Murari Lal*,

34 All 628 10 ALJ 252 16 IC 183, *Achambit Lal v*

Changa Mal, 18 OC 268 3 O LJ 566 32 IC 429, *Basarmal*

v. Khemchand, *supra*, *Patiram v Sheonath*, 2 PLJ 235

1 PLW 463 39 IC 246, and the result of this was that a

purchaser at an auction between the dates of the insolvency

petition and adjudication would acquire a good title to the

insolvent's property against the receiver, *Din Dayal v Gursaran*.

Lal, 42 All 336 18 ALJ 287 59 IC 67. Or, in other

words, this section was held not to be controlled by sec 28 (7).

But the change introduced in the present section has undone

the effect of those cases. *vide* also the notes at pp 201-02,

ante.

Sub-sec. (1) : Benefit of execution

Under this section

no person is entitled to the benefit of any execution of a decree

issued against the property of a debtor as against the Receiver

except where assets have already been realised in the course

of the execution before the date of the admission of the peti-

tion. Cf *Gour Charan v Toyebuddin*, 23 CWN 461. This

point of time should be taken note of, as it is only the proceeds

of an execution sale before that time that are excepted from

the operation of this section, Cf *Srinivasa Naicker v Official*

Receiver South Canara, AIR 1925 Mad 224 75 IC 172,

Lion Lord & Co v Virbhandas, AIR 1926 Sind 199 19

SLR 35 95 IC 705. The expression "date of the admission

of the petition," occurring in sub-sec (1) qualifies "assets

realised," and therefore only assets realised before the date of

the admission of the petition will enure to the benefit of the

execution creditor, *Ramanathan Chettiar v Subramania*, 48

Mad 656 47 MLJ 759 AIR 1925 Mad 248. 20 L.W.

872 85 IC 216. As the words "before the date of admission

etc" do not go with the word "sale", it follows that even if

the sale was before the date of the admission of the insolvency

petition if the realisation of the assets was after that date the Official Receiver and not the particular executing decree holder will be entitled to such assets *vide ibid*. In this case 25 p.c. of the purchase money was deposited by the auction purchaser but before the balance was put in the judgment debtor applied for adjudication and it was held that the decree holder was not entitled to the sale proceeds. See 48 Mad 656 85 I C 216 etc (*supra*)

Under the Act of 190 only the assets realised before the date of the order of adjudication were excluded from the mischief of this section. *K. V. K. I Chetty v Ba Tin* 13 Bur L T 117 61 I C 640 but under the present Act the assets in order to be excluded must be realised before the date of the admission of the insolvency petition under sec 18. If the payment is made to the decree holder on the same date on which the insolvency petition is admitted this section will apply and the decree holder foregoes the benefit of payment even if made at an earlier part of the day than the order of admission as it was not before the date of admission. Besides judicial orders are always taken as having been made at the first moment of the day. *Simons v Official Receiver* 3 Mys L J (B & C) 3

The exception in sub-section (1) applies not only to the amount credited in favour of the attaching decree holder but also to the amount rateably distributed among the other decree holders under sec 73 C P Code. After such distribution the money belongs to the decree holders and not to the judgment debtor and therefore not available in insolvency. *Official Receiver Tanjore v Venkatarama Iyer* 47 M L J 361 (1922) M W N 51 15 L W 37 1922 Mad 31 68 I C 512

Benefit This is another expression of a general character. The creditor is not at all entitled to any benefit. For example if he has attached the property of the debtor he is not entitled to any priority over the Receiver. *Krishnaswami v Official Assignee* 26 Mad 63. *Jitmand v Ramchand* 29 Bom 405. This must necessarily be so as the attaching creditor acquires no interest in the attached property by virtue of the attachment the property remains with the insolvent and upon insolvency vests in the Receiver. *Frederick Peacock v Madan Copal* 29 Cal 478 (F B) 6 C W N 5 - see also *Soobul Chunder v Russik* 15 Cal 202. *Sri Chand v Murari* 34 All 628 10 A L J 252 16 I C 183 (following 29 Cal 478 F B). *Kashinath v Kanhaiya Lal* 37 All 452 13 A L J 700 29 I C 990. *Muhammad Sharif v Radha Mohan* 41 All 274. *Raghunath Das v Suddar Das* 41 I A 251 42 Cal 23 20 C L J 555 18 C W N 1058 13 A L J 154 27 M L J 150 24 I C 304 (P C). *Dambar Singh v Munadar Ali* 40 All

15 A L J 877 43 I C 120 Under the English law, an attaching creditor, after seizure of the debtor's goods, acquires a lien on the attached property, and has therefore the right to have the goods sold and to be paid out of the proceeds of sale, see *Hansluch v Clark*, (1808) 2 Q B 28, *Johnson v Pickering*, (1908) 1 K B 1, 9 *In re Blake*, (1898) 1 Ch 336, *La parte Williams*, (1872) 7 Ch 14 But under the Indian law an attaching creditor has no such right, so if he fails to realise his money by sale of the attached property before the date of the admission of the insolvency petition, he will be relegated to the same position as the other creditors, and will only participate in the rateable distribution of the sale proceeds Cf

The section does not authorise refund of assets realised by a decree holder

Re Prem Lal Dhar, 44 Cal 1016 The section however does not authorise an Official Receiver to claim a refund of money realised by a decree holder in execution of his decree after the admission of a petition to adjudicate the J D an insolvent Sec 144 of the C P Code is of no assistance to the Official Receiver in such a case, *Din Muhammad v Tara Chand* 116 I C 192 (Lah) In such a case, it seems the Official Receiver can institute a suit against the decree holder for recovery of the money realised by him

No person The word 'person' is wide enough to admit of a contention that it includes even persons other than the creditor But the language of the whole section and the word "creditor" in the marginal notes seem to limit the word to a creditor only

Priority of Official Receiver over attaching Creditor As a mere attaching creditor cannot come within the purview of the exception to this section, he has no priority over the Official Receiver, see *Krishna Swami v Official Assignee*, 26 Mad 673, *Jitmand v Ramchand*, 29 Bom 405 *Jetha Bhima v Lady Janbai* 14 Bom L R 904 15 I C 950, *Frederick Peacock v Madan Gopal*, 29 Cal 428 (F B) 6 C W N 577 See also *Shib Kristo v Miller*, 10 Cal 150, *Turner v Pestomji* 20 Bom 503, *Sri Chand v Murari*, 34 All 628 10 A L J 252 Attachment does not create any title in favour of the attaching creditor It merely prevents private alienations The attaching creditor, therefore, ranks with the other creditors, participating with them only in rateable distribution of the assets in the hands of the receiver *Haran*

Attachment *per se* *Chandra v Jaychand* 57 Cal 122 confers no right A I R 1929 Cal 524 123 I C, 737 The attachment, at the most, only creates a species of temporary lien continuing up to the of the admission of the insolvency petition, *Ram Rao*

Wasudeo, AIR 1928 Nag 336 110 IC 893 Cf *Raghu nath Das v Sundar Das*, 42 Cal 72 18 CWN 1058, PC A creditor successfully fighting out a suit under O XXI, r 63, against a claimant under O XXI, r 58, renders the property available to bankruptcy, and does not get any exclusive benefit therefrom as against the receiver, *Harachandra v Jaychand*, *supra* Where a creditor attaches a decree obtained by the insolvent against a stranger, he is not entitled to the benefit of the attachment, as upon insolvency, the right to execute the decree vests in the receiver, *Dambar Singh v Munawar Ali*, 40 All 86, *supra* Cf *In re Assudamal Fatechand*, 101 IC 848 (Sind) The same principle will necessarily hold good also in the case of an attachment before judgment which too will be of no avail against the Receiver, *Bala Krishna v Vieraraghavan* 45 Mad 70 41 M L J 334 (1921) M W N 775 14 L W 334 69 IC 326, also *Re Pollard*, (1903) 2 K B 41—relied on in *Erikulappa v Official Assignee*, 39 Mad 903 32 IC 190 When the estate vests in the receiver upon adjudication the receiver can apply for removal of the attachment before judgment under sec 151 of C P C (as his claim is a statutory claim not falling within the scope of O XXI, r 58), and if he loses, the order will not be “conclusive” under O XXI, r 63, and the one-year rule of Art 11 of the Limitation Act will not apply to his case *Ibid* The receiver referred to in this section and in the next one is the receiver appointed upon adjudication and not the interim receiver, *Subramania Aiyar v Official Receiver Tanjore*, 50 M L J 665 Where a Judgment creditor attached money in the hands of the Court, belonging to his debtor, but before an order transferring such money to the credit of his suit was made another creditor applied to have the debtor adjudged insolvent, held that the amount in custody of the Court could not be treated as assets realised in execution of the decree within the meaning of the section, therefore the receiver could intervene and claim the money for the general benefit of the creditors, *Balchand Devmal v Tekchand*, 22 S L R 345 AIR 1928 Sind 165 113 IC 319 The amount of security deposited in Court for obtaining stay of execution, does not upon the judgment debtor’s insolvency belong to the Official Assignee but to the creditor to whose credit the money was put in *Chouthmull v Cal Wheat & Seeds Association*, 51 Cal 1010

Assets realised The word ‘assets’ means the proceeds from the sale of the property sold in execution of the decree *Ramanatham v Subbaramania*, 26 Mad 179 (181), see also *Sorabji v Gorind*, 16 Bom 91 (98), *Fink v Maharaja Bahadur*, 26 Cal 772 4 CWN 27 Assets are said to be realised when they are actually brought to Court, see *Hafez Mahomed v.*

Damodar, 18 Cal 242 (245), *Srinivasa v Sitaram*, 19 Mad 72 5 M L J 151, *Debi Pershad v Cheine*, 16 IC 84 9 A L J 707, also see 31 Mad 502, *Seadut Roy v Sree Canto*, 10 C W N 634, 33 Cal 639, 13 C W N 1177, *Galstaun v Woomesh Ch*, 25 C L J 303, *Maharaja of Burdwan v Apurba*, 16 C L J 50 15 C W N 872, *Re Ford*, (1900) 1 Q B 264, *Re Pollock*, 87 L T 238. The manner in which the assets are brought to Court is immaterial, so money voluntarily brought into Court may be an asset, *Hari Charan v Birendra Nath*, 35 C L J 327. As to the meaning of the word "realised" see also *Dinendra Nath v Wilson*, 28 Cal 264 (274) 5 C W N 434. Cf also *Viswandhan Chetti v Arunachalam Chetti*, 44 Mad 100 39 M L J 608 12 L W 744 (1921) M W N 14 A I R 1921 Mad 218 60 IC 302 (F B), *Nachiappa Chettiar v Subbier*, 46 Mad 506 44 M L J 413 A I R 1923 Mad 505 72 IC 820 (F B). It has been held that the dictum in *Viswandhan's* case may safely be applied to the interpretation of sec 51 (1) of this Act, *In re Assudamal Fatehchand*, A I R 1927 Sind 194 101 IC 848. See also *Balchand Dermal v Tekchand* A I R 1928 Sind 165 113 IC 319 (*supra*).

With this section compare the provisions of sec 73 of Civil Pro Code, 1908, which also aims at rateable distribution of the debtor's assets among his creditors, and read the cases decided under that section. Where money belonging to a debtor has been attached, if the attaching Court and the custody Court are the same there is a 'realisation in the course of execution by sale or otherwise' within the meaning of sec 51 (1) of this Act, only when so much of the money standing to the credit of the judgment debtor as is necessary to satisfy the decree-holder who has applied to it for execution is ordered to be transferred to the credit of the attaching creditor's suit, *In re Assudomal Fatehchand*, A I R 1927 Sind 194 101 IC 848—following *Viswandhan Chetti's* case, *supra*.

Under this section if the assets have been realised in the course of execution by sale or otherwise before the date of the admission of the insolvency petition the execution creditor will be entitled to the benefit of the execution against the Receiver, *Gour Charan v Toyebuddin* 23 C W N 461 49 IC 460. When the property is sold and the sale proceeds are paid into Court before the bankruptcy, the decree holder issuing out execution gets the benefit thereof as against the receiver *Basarmal v Kheruchand*, 11 IC 433 (Sind). Cf *Ram Sundar v Ramdheyani*, 3 Pat L J 450 46 IC 224. When no order of adjudication is made, the Court is not at liberty to return any money that has come to its hands in execution of a decree but must dispose of it according to law, *Palmer v Cowasjee*, *infra*.

The assets or money should be *realised*, otherwise it will not fall within the exception. If it is simply attached, the attaching creditor will get no benefit from the mere attachment [Cf *Haran Chandra v Joychand*, A I R 1929 Cal 524]. In order to be "*realised*" the money should reach the Court executing the decree, it is not enough if the money be with the Treasury Officer, who retains it for transmission to the executing Court. In other words, mere attachment, of money does not mean *realisation*, *Debi Prosad v Cheine*, 9 A L J 707 16 I C 84. Cf *Gobinda Das v Karan Singh*, 40 All 197 16 A L J 32 43 I C 672. For meaning of the word "*realised*", see *Manilal Umedram v Nanoocha*, 28 Bom 264 (a case under the Civil Procedure Code). When the sale proceeds of the attached property are *actually* deposited in the Court executing the decree, the assets are *realised* within the meaning of this section, *Sri Chand v Murarai Lal*, 34 All 628 10 A L J 252 16 I C 183. In short, as soon as the money is placed in the hands of the Court for the benefit of the decreeholder, it is to be considered as *realised*. *Pati Ram v Sheonath* 2 P L J 235 1 P L W 463 39 I C 246, Cf *Badri Das v Sheonath Singh*, 13 A L J 359 28 I C 816. Thus, in a case the auction purchaser only deposited 25 p c of the purchase money and before he deposited the balance, the judgment debtor applied for adjudication, and it was held that the assets were not realised before the admission of the petition, *Ramanathan Chettiar v Subramaniam*, 48 Mad 656 47 M L J 759 A I R 1925 Mad 248 85 I C 216. Where an order for rateable distribution has been passed

Rateable distribution

under sec 73 of the C P Code, the exception to this section applies and the Receiver gets no more preference in respect thereof, see 42 M L J 362, *supra*. The money must be *realised in execution* of a decree, otherwise this section will not apply. So where the money is in Court in the form of security, it cannot be said to have been realised *in execution*, *Promotha nath v Mohini Mohan*, 19 C W N 1200 31 I C 573. Cf also *Palmer v Cawasjee*, 14 A L J 236 33 I C 723, *Purshotom Das v David*, 13 A L J 893 30 I C 779. Assets realised by sale of the *perishable* property attached before judgment and *before any application* is made for execution are not assets realised in execution, *Seudut Roy v Sree Canto*, 33 Cal 639 10 C W N 634, *supra*. For the meaning of the expression "*in the course of execution*" see *Vibudhapriya v Yusuf Shahib*, 28 Mad 380 15 M L J 202.

Before the date etc. From these words it follows that assets realised on the *same* day as the order of adjudication (though at an earlier hour) vest in the Receiver, not being realised on a *prior date*, *Ex parte Pollard*, (1903) 2 K B 41.

f also *Simons v Official Receiver, Bangalore*, 3 Mys L J B & C) 3 cited at p 302, ante

Sub-Clause (2): The secured creditors are exempted from the operation of the section Cf *Official Receiver v Palanisami*, 48 Mad 750 As to the other rights and privileges of the secured creditors see secs 9 (2), 28 (6) and 47 and the notes thereunder

Compare the provisions of this sub section with those of clauses (b) and (c) of sec 73 of the C P Code, 1908

Sub-sec. (3) : Priority of bona fide auction-purchaser over the Receiver Sub sec (3) protects a *bonafide* auction-purchaser of the insolvent's property from the mischief of this section Cf *Ishar Lukhmidat v Carman*, 21 Bom , 681 , 1894 v *Moore*, (1894) 2 Q B 690 A *bonafide* auction purchaser always acquires a good title against the receiver, *Din Dayal v Gur Saran*, 42 All 336 A purchaser in good faith means a person who did not know at the time of the sale that the judgment-debtor was an insolvent, and could not by the exercise of due diligence have discovered that an adjudication order had been made, *Anantharama v Vettah Kuttimalu*, 30 M L J 611 19 M L T 357 3 L W 501 34 I C 829 For the definition of the words "good faith", see sec 3 (20) of the General Clauses Act, X of 1897 A purchaser of an insolvent's property *even with notice of insolvency* from a *bona fide* auction purchaser, has a good title to it under this sub section against the Receiver, *Madhu Sudhan v Parbati Sundari*, 35 I C 643 (Cal) Once the property is *free* in the hands of a *bona fide* auction purchaser, notice of bankruptcy on the part of the subsequent transferees will not alter the position

The protection afforded by this sub section is only to a purchaser of the property of a *debtor* and not to a purchaser of property which has vested in the Receiver and has ceased in law to be the *debtor's* property, *Anantharam v Vettah Kuttimalu* 30 M L J 611, *supra* This follows from the legal position that an adjudication order vests the insolvent's property in the Receiver , see *Raghunath Das v Sundar Das*, 42 Cal 72 18 C W N 1058, P C The expression "property of the debtor" makes the sub section difficult of interpretation and renders the protection given by it practically illusory when we remember that on an adjudication the property ceases to belong to the debtor, and that under sec 28 (7) the order of adjudication relates back to the date of presentation of the insolvency petition As we are bound to attach some sense to it, especially in the light of *Raghunath Das's* case, we should feel inclined to read this sub section independently of the legal n involved in the doctrine of relation back. vide sec 55, *fra*

52. [§ 35] Where execution of a decree has

Duties of Court executing decree as to property taken in execution

issued against any property of a debtor which is saleable in execution and before the sale thereof notice is given to the Court executing the decree that *an insolvency petition by or against the debtor has been admitted*, the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the receiver, but the costs of *the suit in which the decree was made and* of the execution shall be a first charge on the property so delivered, and the receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge

This is section 25 of the Act of 1907 and is based on sec 41 of the Eng Bankruptcy Act, see under "Change of Law" below

Change of Law In this Act we have got the following words, "an insolvency petition by or against the debtor has been admitted", whereas in the repealed Act we had these words, "an order of adjudication has been made" The change is quite logical, seeing that the order of adjudication is almost a formal matter and the delay in making it is mainly due to the Court's inability to take prompt action, so, it ought not to be reckoned to the detriment of any body The other change is the insertion of the words "of the suit in which the decree was made and" For the notes of the Select Committee on this change, see the Committee's Report, dated the 24th September, 1919

Object and Scope of the Section The object of the section, just like that of the preceding one, is to utilise the insolvent's property for the benefit of the general body of creditors and to prevent any individual creditor from stealing a march over the other creditors This section does not prohibit a Court executing a decree from selling the judgment debtor's property merely by reason of its having been given notice of the admission of an insolvency petition, *Ralla Ram v Ram Labhaya Mal* 6 Lah L J 232 AIR 1925 Lah 158 80 IC 509 It applies only when an application is made to the executing Court for the delivery of the property, *Ibid* Where after attachment of the debtor's property by an executing Court, the debtor is adjudged an insolvent the proper course for the executing Court to adopt is to adjourn the sale and make over the property to the Receiver It is not competent

for such an executing Court to proceed with the sale proposing to pay over the sale proceeds to the Receiver, *Mahasukhi v Valibhai*, 30 Bom L R 455 AIR 1928 Bom 177 (1) 109 IC 152 Consult the following cases 29 IC 990 (All) , 40 Cal 78 , 40 All 197 It should not be lost sight of that the section comes into operation only after the admission of the insolvency petition, *Anup Kumar v Kesho Das*, 39 All 547 15 A L J 473 39 IC 783 N B Both this section and the preceding one are open to the contention that they apply only when there

is a receiver, see *Anup Kumar v Kesho Das*, *supra* Or in other words, "Receiver" in this section is the Receiver appointed under sec 56 (1) after the

order of adjudication and not the *interim* Receiver, *Lyon Lord & Co v Firm of Virbhandas* AIR 1926 Sind, 199 19 S L R 35 95 IC 705 (sc 76 IC 380) , *Subramania Iyer v Official Receiver, Tanjore*, 50 M L J 665 23 L W 300 AIR 1926 Mad 432 93 IC 877 So, it has been maintained that where an *interim* receiver has not been clothed with powers to take possession of the insolvent's property no valid application can be made under this section to the Executing Court to deliver the property to him, *Arunachellam Chettiar v Nayanna Naicker*, 23 L W 513 AIR 1926 Mad 606 94 IC 126 *Vide* notes and cases at p 120, *ante* It seems that a secured creditor will be exempted from the operation of the section, *Official Receiver v Nagaratna Mudaliar*, 49 M L J 643 (1925) M W N 907 AIR 1926 Mad 194 92 IC 497, and this exemption extends to money-decree holders who have obtained securities in the course of execution *Ibid*

Decree The word "decree" here does not include a decree on a mortgage or on security of a secured creditor, *Official Receiver, Tanjore v Nagaratna Mudaliar*, (1925) M W N 907 49 M L J 643 AIR 1926 Mad 194 92 IC 497 So, it follows that where a money decree holder obtains a security bond from his judgment debtor for satisfaction of his decree, and subsequent thereto the judgment-debtor becomes adjudicated, the decree holder, though originally unsecured, will be entitled to proceed with his execution against the properties covered by the security bond, *Ibid*

On application The corresponding words in the Eng Act are "on request," see sec 41 of the English Act An application to deliver property to Receiver also is an essential requisite for the section [cf (1892) 1 Q B 722] , in absence of such an application, the sale of a judgment debtor's property in execution, notwithstanding notice to executing Court of the admission of the insolvency petition, cannot be impeached, either by the Receiver or the creditor, *Ralla Ram v Ram Labhaya Mal*, 6 Lah L J 232 AIR 1925 Lah 158 80 IC

509, but see 30 M L J 611, cited under the heading "Notice" below. Where no application is made hereunder, but the Executing Court has got information

Stay of proceedings of the bankruptcy petition and the property under attachment is not liable to speedy decay or depreciation of value because of delay in its sale, the Court should in the exercise of its inherent jurisdiction order stay of execution proceedings pending the hearing of the bankruptcy petition. Cf *Lyon Lords & Co v Virbhandas*, cited at p 311, *infra*. As to the case where no receiver is appointed, Comp *Ralla Ram's case*, 80 I C 509 (510).

Property of a debtor The execution should be directed against the insolvent's property. This section will not apply if the property be in the joint ownership of the debtor along with other persons, *Deble v Brooke*, (1894) 2 Q B 319.

Saleable As to what property is saleable see the notes under secs 4 & 28, also see sec 60 of C P Code, 1908.

Notice The notice to be given to the Court is about the admission of the insolvency petition, whether it be by or against the debtor. The section does not say by whom the notice is to be given. It seems that for the purposes of this section the notice may be given by any person, primarily, the receiver, and where no receiver is appointed by the Court itself *Ralla Ram v Ram Labhaya Mal*, 6 Lah L J 232 AIR 1915 Lah 158 80 I C 509 (510). Cf *Gobind Das v Karam Singh* 40 All 197 16 A L J 32 43 I C 672. If no notice be given the executing Court will proceed with the execution, and the Receiver cannot afterwards impugn the sale. Cf *Walfords Estate Trustee v Lezy*, (1892) 1 Q B 772. On receipt of such notice, the Court shall deliver the property (if in its possession) to the Receiver. But the Court cannot act *suo motu*, there must be some application made to it praying for delivery of the property to the Receiver. If notwithstanding the notice the Court holds the sale, it is irregular and confers no title on the auction purchaser, *Anantharam v Vettath Kuttimalu*, 30 M L J 611 3 L W 504 19 M L T 357 34 I C 829, but see *Ralla Ram v Ram Labhaya Mal supra*. Also see the notes at p 116. If the sale proceeds are paid to the decree-holder it seems that the Court can in the exercise of its inherent powers, though not exactly under sec 144 of the C P Code, direct him to bring back the money to Court and refund it to the Receiver, just as the Court can direct refund of compensation money under the Land Acquisition Act inadvertently paid to a wrong person, see the following cases 35 Cal 1104 12 C W N 1039 14 C W N 1074 11 C L J 533.

But where the sale-proceeds are paid to the decree-holder in consequence of failure on the part of the receiver to give notice of admission of the bankruptcy petition to the Court,

hereunder, the Court cannot ask for restitution or refund of the amount so paid, in such a case the receiver's remedy lies a separate suit for refund against the decree holder, see *Din Mahammad v Tara Chand*, A I R 1930 Lah 39 116 I C 192.

Property in the possession of the Court According to some opinion, the expression seems to indicate that by *property*, here, only moveable property is meant. Note that in sec 41 of the English Bankruptcy Act, 1914, the word "goods" has been used. This view has found favour in Sind in the case of *Lyon Lord & Co v Firm of Virbhandas*, A I R 1926 Sind 199 19 S L R 35 95 I C 705, wherein it has been held that the section contemplates the delivery of property in the possession of the Court and thereby it restricts its operation to such moveable property which is seized by the Court under the provisions contained in O XXI of C P Code, or which is attached by the Court in such manner as to give possession of such property to the Court. Attachment of immoveable property is effected under O XXI, r 54, C P C not by actual seizure but by an order prohibiting the judgment debtor from transferring or charging the property in any way, therefore such property ought not to fall within the purview of this section, Cf *Lyon Lord & Co v Virbhandas* A I R 1924 Sind 60 76 I C 380, also *Lyon Lord & Co v Virbhandas supra*. It has, however, been pointed out in *Mahasukh v Valibhai*, 30 Bom L R 455 A I R 1928 Bom 177 (1) 109 I C 152, that under sec 64 of the C P Code the effect of an attachment is that the attached property is kept in *custodia legis* during the period of attachment, When the word "property" is here used in a general way, the right view ought to be that this section refers to all kinds of property and is not confined to moveable property alone, see *Haran Chandra v Joychand*, 57 Cal 122 A I R 1929 Cal 524 123 I C 737.

Costs of the suit The costs of the suit in which the decree was made including the costs of execution shall be a first charge on the property to be delivered. Under the repealed Act only the costs of the execution constituted a first charge. The costs herein referred to must be costs authorised by some provision of law, *Re Woodham* (1887) 20 Q B D 40. The costs incurred on account of cutting, carrying, thrashing and dressing corn are not of execution, (*Ibid*). This section is applicable where there is no sale, therefore, poundage fee, which is levied only upon a sale, cannot be included in costs of execution, *Re Ludmore*, (1884) 13 Q B D 415. Costs of arbitration cannot be treated as costs of the suit within the meaning of this section, *Lyon Lord & Co v Virbhandas supra*. The expression "costs of the execution" should have a literal interpretation so as to include the costs of the suit brought by the

decree-holder under O XXI, r 63, C P C to revive an order of attachment, from which the property was released under O XXI, r 60, on a claimant's petition, *Haran Chandra v Joy Chand*, 57 Cal 122 AIR 1929 Cal 524 123 IC 757

Receiver As to whether *Receiver* here includes an *interim receiver*, *vide* notes at p 309, *ante*

53. [§ 36] Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent *on a petition presented** within two years after the date of the transfer, be *voidable* as against the receiver and may be annulled by the Court

Analogous Law Sec 36 of Act III of 1907, Sec 55 of the Presidency Insolvency Act, 1909 This section is taken from Sec 42 of the Bankruptcy Act, 1914, and therefore that Act may be taken into consideration in construing the present statute *Rachamadugu Rangiah v Appaji Rao*, 51 MLJ 719 (1926) MW 99 IC 241 Cf *Sharfuz Zaman v Deputy Commissioner Bara Bank* 10 O & ALR 514 11 O LJ 599 1 O WN 201 AIR 1925 Oudh 28 79 IC 188

Change of Law Under the repealed Act we had the word 'void' in the place of the word "voidable" occurring in the present Act The Select Committee have thus given their reason for this change—"It is settled law that the word void in section 36 of the present Act means 'voidable' only and we have made this clear" One very important amendment has been effected in the section by Act X of 1930 (*vide* the footnote) which received the assent of the Governor General on the 20th March, 1930 For the effect of the amendment *vide* notes under the heading "within two years"

The principle and Scope of the Section One of the main objects of the Bankruptcy law is to effect a fair distribution of the insolvent's properties among his creditors and in order to carry out that object it is necessary that the insolvent should be prevented from putting his properties beyond the reach of his creditors by means of voluntary or fraudulent

* The words *on a petition presented* have been inserted by the Act X of 1930 which received the assent of the Governor-General on 20th March 1930 For the effect of this change of law, *vide* notes at pp 330-31

transfers. So we find in this section and in the next one provisions defining the way in which an order of adjudication will affect the antecedent transactions of the insolvent. "Besides property which was the insolvent's at the time of adjudication, property which had ceased to be his by transfer within two years before adjudication may also be made to vest in the Court and become divisible among the creditors by an order of annulment under sec 53. The annulment has the effect of divesting the transferee and vesting the property again in the insolvent. It then vests under sec 28 (2) in the Court", *Draupadi Bai v Goind Singh* 18 N L R 93 A I R 1922 Nag 221 65 I C 354. This section renders voluntary transfers by the insolvent voidable and liable to be annulled by the Court. Cf *Ishar Das v Ladha Ram* 62 I C 924 (Lah). So where no attempt is made to avoid it and no order of annulment is made, such a transfer may stand. The question of validity of a transfer and annulment thereof arises only after adjudication, and prior to that the Court has no jurisdiction to go into that question, *Mul Singh v Lakhmi Devi*, A I R 1927 Lah 95 95 I C 1055. Cf *Ghulam Husain v Ramesar Das*, 99 I C 524. The word "voluntary" in the marginal note to (and not in the body of) s 53 means gratuitous or without consideration, *Sholapur Spinning and Weaving Co v Pandarinath* 30 Bom L R 893 A I R 1928 Bom 341. Cf 26 Bom 765 (773). Under this section a transfer is voidable as against the receiver, *Re Carter & Kenderdine's Contract*, (1897) 1 Ch 776, referred to in *Re Gunsbourg*, (1920) 2 K B 426 (457). It is but meet that a receiver should be appointed where there is a question of annulment under this section, but where no receiver is appointed, sec 58 of the Act operates, *Comp Bhagwant v Munim Khan*, 6 N L R 146 8 I C 1115.

For analogous provisions see section 42 of the English Bankruptcy Act, 1914, and section 53 of the T P Act. Sec

This section contrasted with sec 53 T P Act. tion 53 of this Act is wider in its scope than sec 53 of the Transfer of Property Act.

Under the latter section transfers made with the intent to defeat or delay creditors or subsequent transferees are made voidable at the instance of the creditors so defrauded, or defeated, see 39 All 95, *infra*. Cf *Ramcharan Lal v Basdeo Sahai*, 102 I C 92 (All), and the new sec 53 of the T P Act. See also *Dronadula Srinamulu v Ponakavira*, 45 M L J 105 (1923) M W N 306 A I R 1923 Mad 641 72 I C 805. Under this section no such intent is necessary. All that is required to attract the operation of this section is that the transfer is not in good faith, nor for valuable consideration, and is made within two years of the adjudication of the debtor. Cf *Ramaswami Aiyangar v Official Receiver*,

50 M L J 448 (1926) M W N 419 94 I C 535 This looks as if a transaction not in good faith and not for valuable consideration, if within two years, is always a constructive fraud on the bankruptcy law. The underlying principle of this is that one must be just before being generous. Under both the section 53 transferees in good faith and for valuable consideration are protected. This section also protects transfers 'made before and in consideration of marriage', *Muhammad Habib ulla v Mushtaq Hussain*, 39 All, 95 14 A L J 1183 37 I C 684 Cf 45 M L J 105 Considerations affecting section 53 of the T P Act do not apply to this section. This section does not debar the creditor or the receiver from proceeding under said sec 53 of T P Act, *Official Receiver v Bishar Souza* 23 L W 643 A I R 1926 Mad 826 95 I C 300 Cf *Mussammat Gaura v Abdul Majid*, A I R 1922 All 443 64 I C 523 Transfers in good faith and for valuable considerations are protected under both the sections no doubt, but the onus of proof is different in the two cases *Hemraj v Ram lishen* 2 P L J 101 38 I C 369 1 P L W 752 Under the Insolvency Act it is the transferee who must show that the transaction was in good faith and for valuable consideration *Mohamed Maliha v Ismail Khan* 46 C L J 168 A I R 1927 Cal 766 104 I C 822 But when the transfer is dealt with under s 53 of the T P Act that is, under s 4 of this Act and beyond the time limit (2 years) prescribed by the section, the question of onus will be the same as in an ordinary suit see *Atmaram Udhardas's* case, *infra*. In England a transaction which is *bona fide* and is not a mere cloak for retaining a benefit to the grantor, is held good under the statute of Elizabeth *Re Fasey Ex parte Trustees*, (1923) 2 Ch 1 This section contemplates only a transfer prior to adjudication and not one subsequent thereto *Hayat Muhamed v Bharam Das*, 26 Punj L R 397 A I R 1926 Lah 146 90 I C 1037 Under the new sec 53 of the T P Act the provisions of that section will not in any way affect the provisions of this section. An application for an adjudication that a certain property was still the property of the insolvent and that no actual gift had ever taken place does not fall within the purview of this section *Sobharam v Waryam Singh* 4 Lah L J 444 The Legislature by enacting this section did not impliedly intend to deprive the debtor or the creditor of their right to have transfers set aside by instituting a suit before an ordinary tribunal within the longer period of limitation, *Atmaram Udhardas v Dayaram*, A I R 1929 Sind 94 115 I C 330 If an application hereunder is time-barred, the Receiver can proceed under s 4 claiming within the longer period a relief which sec 53 of the T P Act authorises, *Ibid*. We have already

Remedy in ordinary
Civil Courts not lost

seen under s 4 that an Insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication notwithstanding the provisions of this section, *Anwar Khan v Mohammed Khan*, AIR 1929 All 105 113 IC 819

Jurisdiction of Court As the Insolvency Court is the only Court to administer an insolvent estate, it necessarily follows that after an adjudication order such Court is the only Court competent to set aside a transfer by the insolvent. The word "Court" in this section and in the next one signifies the Insolvency Court exercising jurisdiction under this Act. No other Court has the jurisdiction to annul a transfer thereunder *Mariappa Pillai v Raman Chettiar* 42 Mad 322 10 L W 59 52 IC 519. That is its jurisdiction is *exclusive* in the matter, *ibid*. So, where a transfer is annulled by the Insolvency Court, that order of annulment cannot be nullified by means of a regular suit in the Civil Court, *Kamiz Fatima v Narain Singh*, 24 A L J 897 AIR 1927 All 66, though an *ex parte* order of annulment may be set aside by the Insolvency Court itself under order IX r 13 of the C P Code, if sufficient cause is shown for non appearance *Govinda Rao v Official Receiver*, AIR 1927 Mad 897 103 IC 381. *vide* notes under the heading "the section confers no exclusive jurisdiction" at p 31, *ante*. While exercising jurisdiction under this Act, the Court should primarily follow the special provisions herein enacted, but that does not mean that it cannot decide questions of general law (as arising under sec 53 of the T P Act or under the personal laws of the parties) as an ordinary Civil Court, *Shikri Prasad v Aziz Ali*, 44 All 71. Cf *Hari Chand v Motiram* 48 All 414, *Fulkumari v Khirode* 31 C W N 502 102 IC 115. There is nothing in this Act to prevent the creditors or the Receiver from proceeding under sec 53 of the Transfer of Property Act if they wish, though they have another remedy under the present section, *Official Receiver v Bastiao Souza*, 23 L W 643 AIR 1926 Mad 826 95 IC 300. Where for the purposes of administration in bankruptcy it is not absolutely necessary to decide a question of general law, an Insolvency Court should not under sec 4 transgress the limits of this Act and usurp a jurisdiction which naturally belongs to the ordinary Civil Court. Cf *Dronadula Siramulu v Ponakalra*, 45 M L J 105 18 L W 426 (1923) M W N 306 AIR 1923 Mad 641 72 IC 805. But for the purpose of doing complete justice between the parties, the Court can go into a question not covered by this Act but triable under the general law, *vide Hari Chand v Motiram supra*. An Insolvency Court has jurisdiction to deal with alienations, made by the debtor, of properties situated outside its local limits.

and such jurisdiction is not affected by the provisions of sec 16 of the C P Code, *Lalji Sahai v Abdul Gani*, 15 CWN 253 12 CLJ 452 7 IC 765 *Vide* notes under the heading "Extra Territorial jurisdiction" at p 35, *ante* But it has been maintained in a Nagpur case that a British Indian Court cannot annul a transfer of property situate in a foreign country, *Draupadi v Gotind Singh*, 18 N L R 93 AIR 1922 Nag 221 65 IC 334, as the Court of such foreign territory may not recognise the transfer, *Ibid* *Vide* notes under the heading "Transfer" below

Transfer outside jurisdiction may be annulled The words used in the section are "may be annulled" and not "must be annulled", therefore, the power conferred by this section should be exercised only if the circumstances of the case call for it, *Bhagwant v Munim Khan*, 6 N L R 146 8 IC 1115 The Court can exercise jurisdiction hereunder only after adjudication, *vide infra*

The power when to be exercised When an alienation is challenged as fraudulent, the Court cannot decline to go into the matter, *Choudappa v Katha Perumal*, 49 Mad, 794 AIR 1926 Mad 801 50 M L J 602 96 IC 944 The Court should not delegate its powers hereunder either to the Receiver or to a subordinate Court

No delegation of jurisdiction *vide, Jagannath v Lachman Das*, 36 All 549, *Simil Routhier v Kumarappa Chetty*, (1916) 2 MWN 182 35 IC 875, and the notes at p 336, under the heading "Procedure" The framing of a schedule by the Receiver does not preclude the Court from entertaining an application by the Receiver to annul the transfer hereunder, *Khadir Shah v Official Receiver, Tinnerelly*, 41 Mad, 30 As to the duty of the Court to hold an investigation under this section, when invited to do so see *Khusali Ram v Bholarmal*, 37 All, 252 13 A J 270 28 IC 57 We have seen at p 217, that an Insolvency Court has at times power to go behind judgments, it may sometimes happen that transfers are the effect of, or founded on judgments of Courts, for example when some sort of transfer is effected in consequence of a reference to arbitration [*Kanaya Lal v Official Receiver*, AIR 1928 Lah 750 110 IC 742], or as a result of compromise decree [*Re Naraindas Sunderdas*, AIR 1936 Sind 133 93 IC 331], a question arises whether the Insolvency Court can re-open such transaction, and there can be no good reason to hold that such transfers are immune from attack in bankruptcy simply because the stamp of the Court has been obtained on them by means of a device, *ibid* *Vide* notes and cases at p 319, *infra*

Jurisdiction to go behind judgment

Requirements of the Section In order to render this section applicable the following requisites must be complied with [see *Isa-ar Das v Ladha Ram*, 62 I C 924] —

- (i) There should be a transfer of property
- (ii) The transfer is not made *before and in consideration of marriage*
- (iii) It is not made in favour of a purchaser or incumbrancer in good faith and for valuable consideration
- (iv) The transfer is within two years prior to the order of adjudication

Those conditions are required to save a transaction from the mischief of this section (1) that the transferee is a purchaser or incumbrancer, (2) that he acted in good faith and (3) that there was valuable consideration, *Elliot, O R v Subbiah* 50 Mad 815 26 L W 248 53 M L J 742 A I R 1927 Mad 869 105 I C 138

Application of Equity where this section does not apply Where the provisions of this section do not in terms apply to a case for example where the question raised relates to the validity of consent by an heir to the will of a Mahomedan testator, it is quite open to the Court to proceed according to rules of Justice equity and good conscience, *Kali Charan v Mahammad* [1930] A L J 588

The Section applies only upon adjudication The section can be put in to operation only *if the transfer or is adjudged an insolvent* So unless there is such an adjudication, the Insolvency Court has no jurisdiction to decide whether a transfer of property is liable to annulment hereunder *Mul Singh v Lakhmi Devi*, A I R 1927 Lah 95 95 I C 1055 *Cf Appireddi v Chinna Appireddi* 45 Mad 189 41 M L J 606 66 I C 271 *Kauleswar v Bhagwan* 42 I C 845

Transfer There should be a transfer of property, a mere contract to transfer cannot justify the application of this section *Ex parte Home* 54 L T 301 As to what is a transfer of property see sec (1) (f) of this Act, *Cf* sec 5 of the T P Act, and for definition of the word 'property' see sec 2 (1)—(d) *ante* The property in this section must be such property as can vest in the receiver under sec 28 that is it may be property of any sort *Re Carter & Kenderdine's Contract* (1897) 1 Ch 76 So it has been held that the lease of a holding which cannot vest in the receiver under sec 28 (5) is not within the mischief of this section *Sagan Mal v Garray Singh* 39 All, 120 14 A L J 1031 38 I C 171 *Transfer* here contemplates *retention* of the property and not its immediate consumption Therefore a gift for maintenance education or advancement or so forth is not within the mischief of the

section, *Re Player*, (1885) 15 Q B D 682, *Re Plumer* (1900) 2 Q B 790 This section applies to a transfer effected by a decree of the Court, *Re Naraindas Sunderdas*, A I R 1920 Sind, 133 93 I C 331 A conveyance of the estate to trustees for distribution is hit at by this section, *Elliot, O R v Subbiah* 50 Mad 815 53 M L J 742 26 L W 248 A I R 1927 Mad 869 105 I C 138 Transfers prior to the time when this Act came into force are within the scope of this section, *Cf Ex parte Todd*, 19 Q B D 186 It does not matter whether the transfer be in respect of the entire property or a part of it, *Bhutnath v Biraj Mohan*, 28 C L J 536 An Indian Court cannot annul transfer of a property situate in a foreign territory. A foreign Court may refuse to recognise such an annulment if made, *Draupadi v Gound Singh*, 18 N L R 93 A I R 1922 Nag 221 65 I C 334 But see *Abdul Khader v Official Assignee* 40 Mad, 810, which has conceded the power of an Insolvency Court to adjudicate on claims relating to property outside its jurisdiction *Vide* also at p 163, *ante* When a creditor challenges the mortgage executed in favour of another creditor on the ground that it is a fictitious thing got up simply to prejudice the creditors, the Court must enquire into the matter, *Khushaliram v Bholar Mal*, 37 All, 252 13 A L J, 270 28 I C 573 In order to attack a transfer as fraudulent it is not necessary to show that the insolvent was actually indebted at the time the transfer was effected A man may commit an "anticipatory fraud" and effect a transfer with a view to screening his properties from his probable and possible future creditors, *Official Receiver, Tanjore v Veddappa*, 47 M L J 431 (1924) M W N 506 20 L W 683 A I R 1924 Mad, 865 82 I C 450 *Cf Steleman v Ashdown*, (1742) 26 E R 688, *Thomas Pillai v Muthurama*, (1910) M W N 141 4 I C 301, *Hossein Bhai v Haji Ismail*, 5 Bom L R 255 A gratuitous transfer may be set aside under sec 53 of the T P Act if the Court finds that the transfer was made with a view to defraud a subsequent *bona fide* transferee for value, *Ram Charan v Basdeo Sahai*, 102 I C 92 (All) A gift of money made by the insolvent a few months before his adjudication to his mistress for the purpose of purchasing a motor car amounts to a "transfer" within the mischief of this section and is liable to be set aside, *Ilahi Jan v Harikishen*, 67 I C 887 (Lah) *Cf Re Tankard*, (1899) 2 Q B 57 68 L J Q B 670, in which a present of jewelry, furniture and money to buy furniture made by a bankrupt to a lady with whom he was intimate was set aside The expression "voluntary transfer" is not limited to any particular form of transfer but is wide enough to cover all sorts of devices that may be practised or suffered by the insolvent to deprive the creditors of the benefit of his property, *Kanaya Lal v Official Receiver*, A I R 1918

Lah 750 110 IC 742 Thus, where a charge was created through the instrumentality of a reference to arbitration and a decree was afterwards obtained on the arbitrator's award, the Court held that the device was a transfer, *ibid* Again, a transfer of the insolvent's property under a decree passed on confession of judgment by the insolvent does not cease to be a voluntary transfer because evidenced by such a decree, *ibid* It has been held that, having regard to the definition of the expression "transfer of property" contained in sec 2 (1) (f) of this Act, a partition of joint family property may amount to a transfer of property within the meaning of this section, *Official Receiver v Chiman Lal* 31 P L R 245 123 IC 286 A deed of release executed by an insolvent accompanied by mutation and transfer of possession is a transfer within the meaning of this section *Amjad Ali v Nandlal Tandon*, 7 O W N 377 123 IC 217, and cannot be annulled if executed more than two years before adjudication *ibid* *Vide* at p 316

A Court has power to enquire into validity of a secured debt independently of this section or sec 54 The mere fact that a transfer is voluntary and not supported by consideration will not justify the Insolvency Court in setting aside the transfer It must also be found that the transaction was fictitious or was a mere pretence or in other words that the transferee was a *benamdar* for the transferor, *Dronadula Srinamulu v Pona Kalra Reddi* (1923) M W N 306 18 L W 426 45 M L J 105 A I R 1923 Mad 641 72 IC 105 The transfer contemplated by this section is valid until annulled by the Insolvency Court, *Sharfuz zamman v Sir Henry Stanyon*, A I R 1923 Oudh, 80 70 IC 253 A transfer in favour of a creditor, effected by the insolvent to save himself from troubles is not a fraudulent one *Puran Chand v Puran Chand* 75 IC 441 A transfer was made shortly before insolvency, but no consideration passed, any attempt, not *bonafide*, to make a show of passing of consideration cannot save the transaction from the mischief of this section, *Kalluri Venkataratnam v Official Receiver Godavari* 18 L W 610 (1923) M W N 180 A I R 1924 Mad 358 76 IC 1006 A mortgage bond in favour of a person not a creditor can be annulled under this section *Appathorai Odayar v Official Receiver Tanjore* A I R 1927 Mad 412 99 IC 683 A transfer in favour of a trustee who undertakes to discharge onerous duties in favour of a purchaser for valuable consideration and if *bonafide* cannot be annulled hereunder *Sharfuz zaman v Deputy Commissioner Barabanki* 11 O L J 599 A I R 1925 Oudh 78 79 IC 888

Transfer by transferee of Insolvent This section applies only when the *transferor* is the insolvent so a transfer by the transferee of the insolvent is not within the mischief of

this section and the Official Receiver is not at liberty to cancel it under this section. See (1899) 2 Q B 57, *Sudha v Firm Nanakchand Daulatram*, 7 Lah L J 160 26 Punj L R 224 AIR 1925 Lah 295 88 IC 89, *Jagannath Ayyangar v Narayan Ayyangar*, 52 IC 761 *Pannammal Ammal v Official Receiver, Tinnevely*, 51 MLJ 228 AIR 1927 Mad 58 97 IC 918, *Govind v Sonba*, 121 IC 663 But see *Ex parte Brown*, (1893) 2 Q B 377 62 L J Q B 279, *Ex parte Norton*, (1893) 2 Q B 381 62 L J Q B 457 *Ex parte Green* (1912) 3 KB 6 (11, 14) 81 L J KB 1213 Cf *Hajal Muhamed v Bhauani Das* 26 Punj L R 397 AIR 1926 Lah 146 90 IC 1037 The fact that the insolvent's transferee comes into Court and makes a statement that the transfer may be vacated does not alter the situation, *Sudha v Firm Nanakchand*, *supra*

Benami transactions This section applies to a case of transfer and its annulment. Therefore, where no annulment is sought but simply an application is made for adjudication that a certain property alleged to have been gifted away by the insolvent was still really his property, and in his possession does not fall within this section, *Sobha Ram v Waryam Singh* 4 Lah L J 444 But when the *benamdar* effects a transfer, perhaps this section can be invoked inasmuch as the *benamdar's* act will be regarded as the act of the true owner, *Lakshmiya v Rai Kishori*, 20 C W N 554

Transfer before and in consideration of Marriage: A transfer *before* and in *consideration of* marriage is not within the mischief of this section. A transfer *after* marriage is however liable to be avoided, *Ex parte Official Receiver*, (1889) 2 Q B 57 So a transfer for a dower settled *long after* the marriage will not be looked upon as a transfer "before and in consideration of marriage" *Muhamad Habibulla v Mushtaq Hussem*, 39 All 95 14 A L J 1183 37 IC 684 In order to be entitled to protection, the transfer must be in *consideration of marriage* the consideration of marriage should not however be a colourable one. So where a debtor lives with a woman as a man and wife, and then goes through the ceremony of marriage in order to be able to call in aid this section to support a settlement of his property on the woman, he will get no protection, *Columbine v Penhall*, (1852), 1 Sm and G, 228 Law will never permit a pre-concerted scheme of fraudulent transfer though it be in the colour of a marriage settlement. If the marriage settlement is so schemed out as to evince a clear attempt to defeat the creditors, it will not be entitled to protection, *Hiltmore v Mason* (1861) 2 J & H, 204, *Bulmer v Hunter*, (1860) 8 Eq 46 But when this element of defraudance is not involved, the above principle has no application.

Montefiore v Bchens, (1868) L R 1 Eq 139, *Mackintosh v Pogose*, (1895), 1 Ch 505. A Court would set aside a marriage settlement when it is shown that the marriage is entered into and the settlement is made in furtherance of a scheme of fraud to which both the husband and the wife are parties, *Ramsay v Calvert*, 15 C W N 221 (2091), also *Re Penington*, (1888) 5 Morr, 268, *Lakshmi Priya v Rai Kishori*, 20 C W N 554. It seems that where the wife is innocent of fraud, the transaction will not be open to attack by reason of the husband's guilt, *Keron v Crawford*, (1877) 6 Ch D 29. A gift of immoveable property to the wife may be a fraudulent transfer but no action can be taken against that property under this section. It may be open to the creditors to file a regular suit in which they may seek a declaration that the transfer is fictitious, *Hinga Lal v Jauahir Prosad*, 5 O W N 964 114 IC 126—referred to in *Amjad Ali v Nand Lal Tandon*, 123 IC 217. The mere fact that the transfer is in favour of a wife will not make it a transfer in consideration of marriage, so a transfer by an

Gift to wife

insolvent within 2 years prior to his insolvency to his wife, not being a transfer made before and in consideration of marriage is liable to be set aside under this section. Cf *Bhutnath v Biraj Mohini* 28 C L J 536 49 IC 87. A presumption arises under sec 53, T P Act, against a transfer to wife without consideration, which can therefore be dealt with under this section, see *Lakshmi Priya v Rai Kishori supra*. For an instance of an impeachable gift to wife see also *Official Assignee v Bidya Sundar*, 30 C L J 428. In this case a deed of gift (of immoveable property) was secretly executed in favour of the wife, at a time when the failure of the firm of which the donor (husband) was a partner, was in sight, if not actually imminent. The matter was kept secret till the firm had been declared insolvent, the lady never obtained possession of the property and no convincing explanation was attempted to justify the transaction, held that the title did not pass from the donor to the donee, *ibid*. But a transfer to her for valuable consideration stands on a different footing and does not suffer from any such presumption and is to be dealt with according to its own merits, *Manappa Pillai v Raman Chettiar*, 42 Mad, 322 10 L W 59 52 IC 519.

Transfer in favour of purchaser or incumbrancer :

When such transfers are in good faith and for valuable consideration, they are entitled to protection [*Campbell v Mithomal* 9 S L R 65 31 IC 50] under this Act just as under the T P Act, *Mohamad Mahi v Ismail Khan* 40 C L J 168 A I R 1927 Cal 766 104 IC 822. Good faith has been defined in sec 3 (20) of the General Clauses Act (X of 1897) as follows—"A thing shall be deemed to be done in good faith

faith where it is in fact done honestly, whether it is done negligently or not " The test of good

Test of Good faith

faith under the section is whether the lender intended that the advance should

enable his debtor to carry on his business and whether he had reasonable grounds for believing that it would enable him to do so, *Campbell v Mithomal*, *supra*, 'Good faith' cannot be inferred from the mere fact that valuable consideration has been paid for the transaction, *Gopal v Ramkrishna*, 17 N L R 69

A I R 1921 Nag 103 62 I C 289, *Narayan v Nathu* 10

N L J 12 A I R 1927 Nag 166 103 I C 486 Cf 39 Mad

250, also *Corlett v Radcliffe*, 14 M P C C 121, *Chidambaram*

v Srinivasa, 37 Mad 227 20 C L J 571 18 C W N 541 (P C)

though a transfer supported by consideration will naturally

raise a presumption of good faith in its favour, *Kunjbehan v*

Madhusudan, 50 I C 117 (All) Passing of consideration raises

a presumption of 'good faith' even when the transfer is in

favour of a relation *Lucas v Official Assignee, Bengal*, 24

C W N 418 56 I C 577 Cf *Re Wethered*, (1926) 1 Ch 167

In order to prove good faith the purchaser must show an un-

mistakable intention in the debtor to pass ownership, and an

intention in himself to acquire it Mere transference of posses-

sion is insufficient to give rise to any inference which would

support an intention to acquire ownership, *Narayan v Nathu*

supra *Vide*, also under the heading "Good Faith" under s 54

post The value of the property is always a material factor

for the determination of the question of *bona fides*, *Muhammad*

Habibulla v Mushtaq Hussain 39 All, 95 (*supra*) Cf

Basiruddin v Mokima Bibi, 22 C W N 709 44 I C 915 (Cal)

Antecedent debts might constitute a good consideration, and

consequently *good faith* *Ibid* Where the vendee is not in any

way connected with the insolvent and the transaction *prima*

facie appears not to be a colourable one and no question of

fraudulent preference arises by reason of the transaction taking

place beyond 3 months before adjudication, the transfer will

not be open to attack hereunder, *Ishar Das v Official Receiver*

A I R 1930 Lah 135 Ignorance of the bankruptcy of the

transferor or of the existence of unsatisfied creditors or of the

fact that property transferred was the only property of the

insolvent, may warrant a hypothesis of good faith, *Sholapur*

Spinning & Weaving Co v Phandharinath, 30 Bom L R 819

A I R 1928 Bom 341 Where the transfer is in favour of a

relation who allows the transferor to

retain possession of the transferred prop-

erty, law will impute a *bad faith* to

the transferee, *Palaniappa Mudali v*

Official Receiver of Trichinopoly, 25 I C 948 (Mad) Cf *Dadul*

v Panduram 55 I C 57 (Nag) Moreover, if that relation

Transfers in favour of
near relations

transferee be not in a financial position to invest any money in the transaction, that will raise a strong presumption as to the fictitious and fraudulent character thereof, *Bhanyan Ram v Official Receiver*, 26 Punj L R 513 A I R 1926 Lah 621 99 I C 708 The circumstance that the transferee was the bankrupt's wife with knowledge of the husband's financial embarrassment is not sufficient to taint her with bad faith, *Official Assignee v Annapurnaammal* 14 M L T 150 20 I C 901, *Basiruddin v Mokima Bibi supra* Where an insolvent transfers all his properties to one creditor solely for a past debt, without providing for his other creditors, by means of an ante-dated document and the transferee, happening to be a relation of the insolvent, takes the transfer with knowledge of all the circumstances the transaction is open to attack here under Cf *Official Assignee v Moidcen Roaether* 50 Mad, 948 (a case under the Presidency Act), also *Kalluri Venkata ratnam v Official Receiver* (1923) M W N 780 18 L W 810 A I R 1924 Mad 358 76 I C 1006 If the transaction is not a cloak to retain a benefit for the debtor mere cognisance of the bankruptcy will not be sufficient to negative the *bona fides* of the purchaser *Kaminikumar v Hirala* 23 C W N 769 Cf *Re Fasey Ex parte Trustees* (1923) 2 Ch 1 A purchase for value not made in good faith i.e. where the purchaser is privy to the fraudulent intention of defeating and delaying creditors is bad *Re Maddever*, (1884) 27 Ch D 523 Where an insolvent executes a deed of gift only four days before filing his schedule of insolvency, fraud may reasonably be suspected, *Hussaini v Muhammad Zamir* 74 I C 802 Likewise, a nominal sale shortly before bankruptcy was held voidable for want of good faith, see *Kalluri Venkataraman v Official Receiver*, (1923) M W N 780 18 L W 610 A I R 1924 Mad 358 76 I C 1006 A transfer though supported by consideration is not in good faith where its effect is to secret a fairly large part of the insolvent estate *Ramaswami v Official Receiver* 50 M L J 448 (1926) M W N 419 23 L W 734 A I R 1926 Mad 672 94 I C 535 Such

Good faith on whose part good faith must be present in the transferee whether there is good faith or not in the transferor see *Mackintosh v Pogose*, (1895) 1 Ch 505 Lord Hatherley in *Butcher v Stead* (1855) L R 7 H L 839 thus observed 'I think the Legislature (i.e. of the English Bankruptcy Act) intended to say that if you, the debtor, for the purpose of evading the operation of the Bankruptcy Law and in order to give fraudulent preference make this payment or discharge it shall be wholly done away with except in cases where the person you have favoured is wholly ignorant of your intention to favour him' A similar view was also taken in a Madras case *Gopal v Bank*

of Madras, 16 Mad 397 3 M L J 197 See also under section 54, *post* Also Cf *Golden v Gillam*, L R 20 Ch D 359, *Motilal v Uttam*, 13 Bom 434; *Hood v Dixie*, 7 Q B 89. So, it has been maintained that if money is raised by an insolvent by pledging property for the purpose of paying creditors, whatever may be the view of the mortgagor in paying the creditors if the mortgagee acts *bona fide*, the transaction would be valid against the Official Receiver, *Janki Ram v Official Receiver, Coimbatore*, 78 I C 16 Where the transaction is between close relations, law may assume that the transferee was actuated by motive to assist the transferor, and therefore was a privy to his fraudulent scheme Cf *Chidamlaram Chettiar v Sami Aiyer*, 30 Mad 6 The language of the section deserves a passing notice It should not be lost sight of that the expression "transfer made in good faith etc" naturally implies the necessity of good faith in the maker of the transfer i.e. the transferor but the decided cases both here and abroad insist on good faith in the transferee whatever might be the motive of the transferor The reason for this persistency is perhaps the consideration that the annulment of a transfer inflicts no penalty on the transferor but on the transferee who ought not to be punished for the malafides of the former if he was no party thereto If these decided cases correctly represent the law, the language of this section is undoubtedly faulty But having regard to the policy of the Act which requires good faith in the bankrupt from start to finish as a condition precedent to his obtaining the benefits of the Act, we are apt to think that the Legislature has advisedly exacted good faith from the transferor, inasmuch as such good faith in him coupled with valuable consideration precludes all possibility of bad faith in the transferee, at any rate, excludes such bad faith from the domain of practical politics

The words "in favour of" indicate that the purchaser or the incumbrancer need not be immediate alienees of the debtor *In re Slobodinsky* (1903) 2 K B 517

As to the meaning of "purchaser" see *Hance v Harding*, 20 Q B D 732 (737), see also *Re Pope*, (1908) 2 K B 169 77 L J K B 169

Purchaser

It applies to any case where there is a *quid pro quo*, (one thing for another), *Ibid* The word is not here used in the literal sense of a buyer it means a person who has given valuable consideration, *Official Receiver of Trichinopoly v Somasundaram*, 30 M L J 415 34 I C 60 The word "purchaser" is used here in the wider sense commonly given to that term in English law and not in the mercantile sense of a person who has bought something by a contract of purchase and sale The word here includes a "trustee," *Sharf zaman v Deputy Commissioner, Bara Banki*, 11 O L J 500

AIR 1925 Oudh 28 79 IC 888, *Sharf-uz zaman v Henry Slamon* 25 OC 291 AIR 1923 Oudh 80 70 IC 253, *Re Parri, Exp Salamon*, (1904) 1 KB 129 In order to constitute a person a purchaser it is not necessary that either money or physical property must be given by him, *Re Pope, supra* But see *Elliot v Koppuruppu Subiah*, 26 LW 248 105 IC 138 The word "incumbrancer" may justify a conclusion that a transfer of any interest in the property is contemplated in this section The term is undoubtedly very wide

For the definition of "consideration", see sec 2 (d) of the Indian Contract Act As to what may

Valuable consideration be said to be valuable consideration see

Currie v Misa, LR 10 Exch 102,

Ex parte Hillman, 10 Ch D 622 40 LT 178, *Walker v Burrows*, 1 Atk 93, *Re Pope*, 77 LJKB 767, (*supra*) "A

valuable consideration may consist either in some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other," *Currie v Misa supra* See also the following cases, *Mahamadunnissa Begum v Bachelor*, 29 Bom 428 *Ashidbai v Ibdulla* 31 Bom 271, *Higan v E S L Life Assurance*, (1909) 1 Ch 291, *Re Wethered*, (1926) 1 Ch 167

A lease granted by the insolvent of his property at a reasonable rent is a valid transaction, and is not open to annulment under this section, *Desraj v Sagar Mal*, 38 All

37 13 ALJ 1064, 31 IC 716 The word "and" between

good faith and valuable consideration shows that both the conditions should be fulfilled, so, where a transaction is partly

for valuable consideration and is partly with a fraudulent intent, it is open to attack, *Chithambaram v Sami Ayyar*, 30 Mad 6,

Palaniappa v Official Receiver, Trichinopoly, 25 IC 948 Antecedent debts might constitute a good consideration for a

conveyance sought to be impugned under this section, *Basir-uddin v Mokima Bibi* 22 CWN 709 44 IC 915

Prima facie 'old debts' are good consideration, into the adequacy of which the Court will not enter, *Kunja Behari v Madhu Sodan*,

50 IC 117 (All) Money genuinely paid in discharge of genuine debts will stand the alienance in the shoes of the person

paid off, *Ramaswami Aiyangar v Official Receiver, Coimbatore*, 50 MLJ 448 23 LW 734 (1926) MWN 419 AIR

1926 Mad 672 94 IC 535 Where a son settles his property on the father in consideration of the latter maintaining him

and his wife and children, the Court will consider whether it is a *bona fide* transaction for saving the property from the

insolvent himself and for preventing him from ruining his family and children or it is a mere contrivance to screen his properties

from the reach of future creditors If it is of the former description it will be a perfectly good one, otherwise, the C.

will be justified in looking upon it as a fraudulent one, *Official Receiver v Vedappa Mudaliar*, 47 M L J 431 (1924) M W 508 20 L W 683 A I R 1924 Mad 865 82 I C 450 A transfer by a debtor of most of his properties to a few of his creditors for distribution among all the creditors *pro rata* is a transfer in good faith and for valuable consideration and therefore not voidable, *Official Receiver of Trichinopoly v Somasundaram*, 30 M L J 415 34 I C 602 A transfer to a creditor in consideration of his past debts is not within the mischief of this section, though it may be liable to attack under sec 54 if falling within the three months' limit, *Official Receiver v Lachmi Bai*, A I R 1926 Sind 140 92 I C 5 The reason for this view is that in absence of any statutory limitations imposed by the Bankruptcy law, the creditor is as much at liberty to secure the repayment of his debts by superior intelligence as by accepting a voluntary preference provided he goes no further than what is necessary to serve his own purpose, *Ibid* A transfer for dower is a transfer for valuable consideration, *Muhammad Habibulla v Mushtaq Hussain* 9 All 95 14 A L J 1183 37 I C 684, *Umrud Begam v Ahmed Ali*, 11 A L J 614 20 I C 641, and is not to be declared fraudulent, *Nasimmunnissa v Abdul Kadir*, 20 O C 295 43 I C 280 A responsibility to discharge onerous work taken upon himself by a person to whom properties are transferred in consideration of his taking such responsibility, falls within the expression "valuable consideration," *Sharfuz Zaman v Deputy Commissioner, Bara Banki*, (*supra*) The question of proof of a debt under sec 33 is different from the question of annulling a mortgage under this section, *Jugalpada v Ganesh* 44 I C 108 A fraudulent conveyance may assume various shapes Thus, where a bankrupt with the object of removing his assets out of the reach of his creditors, floats a limited company and transfers all his assets to it in lieu of a few shares in it, the transaction may fall within the scope of this section *Re Fasey Ex parte Trustees*, (1923) 2 Ch 1 A surrender of *karsha* holdings in favour of the land lord by an insolvent *raiyat* cannot be supported as being for valuable consideration because the transaction would relieve the *raiyat* of further liability for future rents, *Mohamad Maliha v Ismail Khan*, 46 C L J 168 A I R 1927 Cal 766 104 I C 822

Voidable The repealed Act contained the word 'void', which was strictly construed in certain cases and the whole transfer used to be considered as *ipso facto* void, *Bhutnath v Birajmohini* 28 C L J 536 49 I C 87 Cf also *Monmohan Das v McLeod* 26 Bom, 765, and in other it was interpreted as merely voidable, see the following cases, *Abdul v Official*

Assignee of Madras, (1919) M W N 247, *Official Receiver of Trichonopoly v Somasundaram* 34 I C 602 30 M L J 415; *Mariappa v Raman Chettiyar*, *infra*, *Ussam Kassim v Palat*, 38 I C 231, *Sankaranarayana v Alagiri*, (1918) M W N 487 35 M L J 296 8 L W 281 49 I C 283 The Legislature has accepted this latter view and obviated all controversy by using the word "voidable" For distinction between "void" and "voidable," see *Janglal v Ladu Ram*, 1919 Pat, 105 (F B) "That which is void can be treated as non-existent and of no binding force and effect, but that which is merely voidable is valid and binding until it is declared to be invalid by a competent tribunal," *Ibid* The transfer being simply voidable stands good till avoided at the instance of the Receiver, *Mariappa v Raman Chettiyar* 42 Mad, 322 10 L W 59 52 I C 519, relying on *Sharf uz Zaman v Henry Stanjon*, 25 O C 291 A I R 1923 Oudh 80 70 I C 253 See also *Palaniandi Chetty v Ipparu Chettiyar*, 30 M L J 565, *Subrahmania v Muthia Chettiyar* 41 Mad, 612 (F B), *Hari Chand v Motiram*, 48 All 414 24 A L J 495 94 I C 429 See also *Official Receiver, Coimbatore v Palanisami*, 48 Mad, 750 (1925) M W N 672 49 M L J 203 A I R 1925 Mad 1051 88 I C 934, *Ismailjee v Manghanmal* 5 S L R 80 12 I C 622 As the transaction is only voidable and not void, the effect is that the mortgagee is not without his remedy against the mortgagor, *Ibid* Therefore, he can proceed with his mortgage suit against the mortgagor in the ordinary Civil Court, *Ibid* The transfer is voidable against the Receiver and is not necessarily voidable as against all persons Therefore, where neither the Receiver nor the Insolvency Court challenges such a transfer, a prior gratuitous transferee from insolvent has no *locus standi* to challenge the transfer, *Ram Charan v Basdeo Sahai*, A I R 1927 All 731 102 I C 92 Cf *Sheonath Singh v Munshi Ram*, 42 All, 433 18 A L J 449 55 I C 941, *Shiam Surup v Nand Ram*, 43 All, 555 19 A L J 511 63 I C 366 .

In deciding whether a mortgage is voidable under this section it is not necessary for a Court to consider whether it is invalid as contravening the provisions of sec 59 of the T P Act as to attestation, registration etc, *Anantaram v Yussuff Omar*, 36 I C 903 31 M L J 133 The transfer is voidable only from the date when the receiver's title accrues, that is, to say, the commencement of the insolvency proceeding A purchaser for value from a beneficiary under the settlement before that date has a good title against the receiver, *Re Carter & Kenderine*, (1897) 1 Ch. 776, see also *Re Holden*, (1887) 20 Q B D 43 So, the effect is that so long as the sale is not annulled, the receiver has

Receiver has no right to possession unless the sale is annulled

will be justified in looking upon it as a fraudulent one, *Official Receiver v Vedappa Mudaliar*, 47 M L J 431 (1924) M W 508 20 L W 683 AIR 1924 Mad 865 82 IC 450 A transfer by a debtor of most of his properties to a few of his creditors for distribution among all the creditors *pro rata* is a transfer in good faith and for valuable consideration and therefore not voidable, *Official Receiver of Trichinopoly v Somasundaram*, 30 M L J 415 34 IC 602 A transfer to a creditor in consideration of his past debts is not within the mischief of this section, though it may be liable to attack under sec 54 if falling within the three months' limit, *Official Receiver v Lachmi Bai*, AIR 1926 Sind 140 92 IC 1 The reason for this view is that in absence of any statutory limitations imposed by the Bankruptcy law, the creditor is as much at liberty to secure the repayment of his debts by superior intelligence as by accepting a voluntary preference provided he goes no further than what is necessary to serve his own purpose, *Ibid* A transfer for dower is a transfer for valuable consideration, *Muhammad Habibulla v Mushtaq Hussain*, 39 All 95 14 A L J 1183 37 IC 684, *Umrad Begam v Ahamed Ali*, 11 A L J 614 20 IC 641, and is not to be declared fraudulent, *Nasimunnissa v Abdul Kadir*, 20 O C 295 43 IC 280 A responsibility to discharge onerous work taken upon himself by a person to whom properties are transferred in consideration of his taking such responsibility, falls within the expression "valuable consideration," *Sharfuz Zaman v Deputy Commissioner, Bara Banki*, (*supra*) The question of proof of a debt under sec 33 is different from the question of annulling a mortgage under this section, *Jugalpada v Ganesh* 44 IC 108 A fraudulent conveyance may assume various shapes Thus, where a bankrupt with the object of removing his assets out of the reach of his creditors, floats a limited company and transfers all his assets to it in lieu of a few shares in it, the transaction may fall within the scope of this section *Re Fasey Ex parte Trustees*, (1923) 2 Ch 1 A surrender of *larsha* holdings in favour of the land lord by an insolvent *raiyat* cannot be supported as being for valuable consideration because the transaction would relieve the *raiyat* of further liability for future rents *Mohamad Maliha v Ismail Khan*, 46 C L J 168 AIR 1927 Cal 766 104 IC 822

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Receiver has no right to possession unless the sale is annulled

no right to get into possession of the property, *N V S Chetty Firm v Bailiff of District Court*, 4 Bur L J 56 AIR 1915 Rang 224 89 IC 61

Position of Transferee redeeming a prior mortgage :

A transferee paying off a prior mortgage on the transferred property steps in the shoes of such prior mortgagee and is entitled to be entered as a scheduled creditor to the extent of the redemption money even though the transfer in his favour is annulled as fraudulent under this section, *Ramprasad v Jaskaram*, AIR 1925 Nag 73 21 N L R 21 82 IC 489 Cf 76 IC 1006 But where the transferee makes payment to a prior mortgagee pending the insolvency proceedings his payment will not be deemed *bona fide* and he will not be entitled to the benefit of the above principle, *Kollun Tenkataratnam v Official Receiver, Godavari District*, (1911) M W N 780 18 L W 610 Vide also *Jagannath v Narayana* 52 IC 761 (Mad)

Who is to make the application The transfer is voidable against the Receiver so he is the proper person to impeach the fraudulent transfer by the insolvent, *Ialji v Abdul* 12 C L J 452 15 C W N 253 (256) It is the Receiver alone and not the creditor who can move the Court for annulment of such a transfer, *Ram Sundar v Ramcharit*, 51 Cal, 663, AIR 1924 Cal 827 79 IC 326, *Basanti Bai v Nanhe Mal* 46 All, 864 33 A L J 792 89 IC 357, see also *Ishar Das v Ladha Ram*, 62 IC 924 (Lah), *Panna Anantanarayana v Ram Subba* 47 Mad, 673 18 L W 857 AIR 1924 Mad 145 *Ippireddi v Ippireddi* 45 Mad, 189 41 M L J 600 (1921) M W N 816 14 L W 639 AIR 1922 Mad, 246 66 IC 271, *Jhabba Lal v Shub Charan*, 30 All 152, *Mariappa Pillai v Raman Chettiar*, 42 Mad, 322 10 L W 50 52 IC 519 A previous gratuitous transferee has no right to challenge the validity of a transfer hereunder, see *Ram Charan v Basdeo Sahai* cited at p 327, ante A proceeding to annul a transfer under this section is to be taken in the name of the Receiver, *Kauleswar v Bhaican*, 42 IC 845 (All), *Nakkammal*

Procedure where no Receiver is appointed or where Receiver refuses to act receiver be appointed or if the receiver refuses to interfere, then of course a creditor can proceed in the matter with

the leave of the Court Until however the Receiver has refused or declined to act no one else is entitled to do so, *Hemraj v Ramkishan*, 2 Pat L J 101 (1917) Pat 303 38 IC 369, see also *Ex parte Kearsley* (1886) 17 Q B D 1, *Ex parte Moore*, 2 Q B D 517, *Rose v Buckett*, 2 K B D 440 Ordinarily, annulment of a fraudulent transfer cannot be at the instance of a creditor (except in the cases of non appointment or non intervention of the Receiver), but

only on the motion of the Receiver, proceedings being taken in his name, *Bansi Lal v Rangilal*, 6 N L J 47 10 N L R 82 AIR (1923) Nag 97 72 IC 418, *Seth Shoolal v Girdhari Lal*, AIR 1924 Nag 361, 78 IC 140, *Daryai Singh v Kunj Lal*, AIR 1924 Lah 553 75 IC 605, *Purthinath v Bashcuar Nath*, 69 IC 403. But this should not be taken as an absolute or inflexible rule that no one else can set the law in motion, *Daryai Singh v Kunj Lal*, *supra*. *Ananthanarayana v Sankaranarayana*, 47 Mad, 673 18 L W 857 AIR 1924 Mad 345 79 IC 395 (*supra*). See now sec 54A below. If the Receiver's application is dismissed and he does not further proceed, a creditor can pursue it in appeal, *Chodappa v Katha Perumal*, 49 Mad, 794 AIR 1926 Mad, 801 50 M L J 602 96 IC 944. Cf *East India Cigarette Mfg Co v Ananda Mohan*, 24 C W N 401. The appeal should however be carried on by the creditor as representative of the general body of creditors, 49 Mad, 794 (*supra*). It being for the Receiver to take action under this section it is not competent for the Court, by the same order adjudicating the insolvent to order cancellation of a sale by the insolvent, *Appireddi v Appireddi*, 45 Mad, 189 (*supra*). Generally, no proceeding should be commenced until after the appointment of the Receiver, *Kauleshar v Bhaun* *supra*, *Mariappa Pillai v Raman Chettiar*, 42 Mad, 322 10 L W 59 52 IC 591. An *ad interim* receiver, who is inferior to a regular receiver cannot take proceedings hereunder. So it necessarily, follows that an order as to the validity of a transaction passed while the estate is in the hands of an *ad interim* Receiver is not *res judicata* against the regular Receiver and will not debar him from making an application under this section, *Ram Saran Mander v Shriya Prasad*, 58 IC 783 (Pat). As it is the receiver who takes the initiatory steps to have a fraudulent transfer annulled, it is desirable that he should be a gentleman of some legal training. Cf *Kunja Behari v Madhu Sodan*, 50 IC 117. "It is the duty of the Insolvency Court to be astute to look after the Insolvency proceedings so as to ascertain whether anything can be saved for the creditors. But when a Receiver is appointed and he is a gentleman of legal training it is better to leave him to take the initiatory steps to get voidable or fraudulent transfers annulled," *Ibid*.

Within two years

Prior to the amendment of 1930 (*vide* the Footnote at p 312, an order of adjudication was held to relate back to and take effect from the date of the presentation of the insolvency petition under sec 28 (7), and therefore the two years were to be computed with reference to the said date of 'presentation', *Rakhal Chandra v Shudhindra* 46 Cal 991 24 C W N 172 52 IC 747. But Cf *Ameena Khatum v Nafar Chandra Pal Choudhury*, 45 IC 180 (Cal).

It was said that the words "the transferor is adjudged insolvent" in the section meant "the adjudication of insolvency against the transferor takes effect," and not "the order of adjudication is passed," *Sankaranarayana v Alagiri*, 35 M L J 296 (1918) M W N 487 24 M L T 149 8 L W 281 41 I C 283, *Rachamadugu v Rangiah v Appaji Rao*, 50 Mad 300 51 M L J 719 (1926) M W N 972 A I R 1927 Mad 163 99 I C 241, *Simhadri Venkata Narasaya v Official Receiver, Gadarey* (1927) M W N 429 (1927) M W N 701 5 M L J 136 26 L W 61 A I R 1927 Mad 826 104 I C 17, *Sheonath v Munshiram*, 42 All 433 18 A L J 440 5 I C 941, *Bhagiant v Munim Khan*, 6 N L R 146 8 I C 1115 (1116) But this view was not accepted by the Bombay High Court, according to which the two years' lim-

was to be calculated from the date of adjudication order, therefore a transfer beyond two years of that date though within 2 years of the date of presentation of the petition would not be within the mischief of this section, *Nagindas v Gordhandas*, 49 Bom 730 27 Bom L R 967 A I R 1925 Bom 480 88 I C 941 A similar view seems to have been taken also by the Allahabad High Court *Harichand v Motiram*, 48 All 414 24 A L J 495 A I R 1926 All 470 94 I C 429 The view of the Lahore High Court in this matter accorded with that of Bombay, *Ghulam Muhammad v Panna Ram*, A I R 1924 Lah 374 72 I C 43 —approving *Jokan Singh v Deputy Commissioner, Ferozepore* 23 I C 924 (Oudh) A recent Full Bench decision of the (Lahore) High Court has held that sec 28 (7) of the Act does not control this section see *Hem Raj v Krishen Lal*, 10 Lah 106 29 Punj L R 446 A I R 1928 Lah 361 111 I C 10 (F B) The Chief Court of Sind and Rangoon High Court too following the Bombay and Lahore Courts refused to import the doctrine of 'relation back' in this section and held that the date of adjudication and not that of presentation of the insolvency petition is the *terminus a quo* for the purpose of computing the period of limitation prescribed by the section *Official Receiver v Tirathdas*, A I R 1927 Sind 66 97 I C 321, *Atmaram v Davaram*, A I R 1929 Sind 94 115 I C 350, *Maung Pe v Maung Po* 6 Rangoon, 193 A I R 10 Rang 148 110 I C 361 For the reason of this view, read the observations in *Ghulam Mahomed v Panna Ram*, *supra*. Thus, there was a conflict of authority as to whether the *terminus a quo* for the calculation of the period of 110 years should be the date of the order of adjudication or the date of the presentation of the insolvency petition and we suggested for legislative interference in the matter. The Legislature has now, accepting the Calcutta view, provided that the *terminus*

a quo should be the date of the presentation of the insolvency petition. This view better accords with the policy underlying the Act, the contrary view encourages a resort to subterfuges to defer the order of adjudication.

The two years' time must not however be determined with reference to the date of presentation of the petition of insolvency in a wrong Court, as sec 14 of the Indian Limitation Act cannot be invoked for this purpose, *Mahammad Marakkhar v Official Receiver of Tinnevely*, (1917) M W N 103 3 L W 123 3 L W 123 36 I C 828. We, however, feel inclined to say that the effect of the amended section 29 of the Limitation Act is to supersede this case. It seems that the date of actual presentation will be the starting point of calculation and not the date when the petition is put in form by supplying the omissions as to Court fees and signatures etc and is registered as the insolvent should not be allowed to take advantage of his own omissions and laches.

Article 181 of the Limitation Act does not govern applications under this Act, see (1920) M W N

Limitation

lxv (65), *Daryaz Singh v Kunjal*, AIR 1924 Lah 553 75 I C 995,

Ramaswamiiah v Subramania, AIR 1925 Mad 172 79 I C 443, following *Durayya Solagyan v Venkatarama*, 12 L W 535 60 I C 123. Also see under "Limitation", *post*

Transfer more than two years old Under the old Act of 1907 an Insolvency Court had no power to decide questions of general law but had to confine itself within the four corners of this Act, with the result that it could not deal with a transfer more than two years old and the remedy of a creditor in such a case was to institute a suit under sec 53 of the P T Act, *Gaura v Abdul Majid*, AIR 1922 All 443 64 I C 523, but now sec 4 has conferred wider powers upon the Insolvency Court and has enabled it to launch into investigations foreign to this Act, see *Shikri Prasad v Aziz Ali*, 44 All, 71 10 A L J 862 63 I C 601, *Anwar Khan v Mohammad Khan*, 51 All 550 (1929) A L J 155 27 A L J 155 AIR 1929 All 505 113 I C 819 (F B), *Maida Ram v Jagannath*, AIR 1930 Lah 180 123 I C 539. *Vide* also under the heading "Jurisdiction of Court" at p 315. Ss 51 to 55 of the Act do not restrict or purport to restrict the wide jurisdiction conferred by s 4 (1) of the Act, *Anwar Khan's* case, *supra*. "The fact that the application as one under sec 53 is time-barred does not prevent the Official Receiver from having recourse to sec 4." *Official Receiver Tirathdas v Mexaram*, AIR 1927 Sind, 66 97 I C 321. Therefore, now, if a transfer be more than two years prior to bankruptcy, and therefore not within the mischief of this section, it will be

competent for the Receiver to ask the Insolvency Court to adjudicate upon the validity of the transfer in accordance with the provisions of section 53 of the Transfer of Property Act and the Insolvency Court will be entitled by virtue of sec 4 to assume jurisdiction to try the matter treating the Receiver's application as a regular suit, *Hari Chand v Motiram* 48 All 414 24 A L J 495 AIR 1926 All 470 94 IC 429 See also *Kochu Mahomed v Sankaralinga* 40 M L J 219 62 IC 495 But if the Court declines to pronounce on the validity of the transfer, it will not operate as *res judicata* and a regular suit will not be barred, *Gaura v Abdul Majid*, *supra* The power of embarking on an enquiry under sec 4 is however discretionary and where the Court finds that proceeding under this section cannot be taken because of limitation, it may in the exercise of its discretion instead of launching into an enquiry under sec 4 relate the parties to a regular suit *Muruga Konar v Official Receiver*, (1930) M W N 40 According to some view section 4 does not give the Insolvency Court a wider power than that which is contained in this section to annul transfers and therefore a deed of release executed more than two years before the adjudication cannot be set aside *Amjad Ali v Nand Lal* 7 O W N 377 AIR 1930 Oudh 314 123 IC 217 Having regard to the opening reservations of sec 4 much can be said in favour of this view Read the illuminating judgment of Sen J in *Anwar Khan v Mohammad Khan* *supra* Read also a very learned article in AIR 1930 Journal at pp 15 18 Cf *Hingalal v Josalal* 5 O W N 964 114 IC 126 As to whether the two years prescribed by the section should be reckoned from the date of filing the insolvency petition in the *proper*, and not in a *wrong* Court *vide supra*

Remedy in cases of old transactions Where a transaction is several years old the Court can adopt the procedure recommended by *Hari Chand v Motiram*, *supra* or can direct the creditor to pursue his remedy by a regular suit under sec 53 T P Act, see *Gaura v Abdul Majid*, *supra* *vide* also *Anwar Khan v Mohammad*, cited at p 331

Burden of Proof The person impeaching the transaction is only to prove that it took place within two years of the insolvency of the transferor, and when this has been done the onus is shifted on to the transferee to establish the bona fides and good consideration of the transaction which he seeks to maintain *Hemraj v Ramkishan* 2 P I J 101 1 P I W 38 IC 369 *Bansilal v Ranglal* 19 N I R 32 VII N 15 97 71 IC 418 The section casts a heavy burden on the transferee to prove his bona fides *Itmaram* 111 Divaram AIR 1929 Sind 91 115 IC 330 *Ala* *Kao v Hiralal* AIR 1925 Nig 25 53 IC 216 1

faith and valuable consideration have to be proved by the alienee or by the person who supports the transfer, *Official Receiver v Vedappa Mudaliar* *infra* See also *Mohammad Halibulla v Mushtaq Hussain* 50 All. 95 14 A.L.J. 1183 37 IC 684 *Nilmoni Choudhuri v Basanta* 10 C.W.N. 865 29 IC 114 *Anantarama v Yussufji* 31 M.L.J. 133 (1916) 2 M.W.N. 236 56 IC 903 (1916) 2 M.W.N. 236, *Official Receiver v Lachmi Bai* AIR 1926 Sind. 140 92 IC 5, *Basiruddin Thanadar v Mokima Bibi* 22 C.W.N. 709 44 IC 813, *Chinna Meera v Kumara Chakravarthi* 36 IC 906 (Mad) *Basant Bai v Nanhe Mal*, 46 All. 864 L.R. 64 39-23 A.L.J. 797 AIR 1926 All. 29 89 IC 357, *Official Assignee of Madras v Sambanda Mudaliar*, 43 Mad. 759 39 M.L.J. 345, *Seth Maniklal v Raja Bejoy Singh*, (1921) M.W.N. 80, *Official Assignee v Moideen Roather*, 50 Mad. 948 The burden of proving consideration and bona fides under this section is on the transferee, *Syed Molamad v Choudhari Mahammad* 46 C.L.J. 168 AIR 1927 Cal. 766 104 IC 822 Payment of good consideration raises no presumption of good faith *Gopal v Ram Krishna*, 17 N.L.R. 69 62 IC 289, *Appathurai Odayar v Official Receiver, Tanjore* AIR 1927 Mad. 412 99 IC 683 *Phula Shah v Firm Ram Shah Prem Das*, 28 Punj L.R. 75 AIR 1927 Lah. 415 101 IC 588 (Lah) The reason for this view is that every transaction of the insolvent relating to his property within two years of his insolvency is treated as *prima facie* invalid, and any one alleging the contrary must show the transaction to be valid and bona fide *Official Receiver, Tanjore v Vedappa Mudaliar*, (1914) M.W.N. 506 47 M.L.J. 431 AIR 1924 Mad. 865 82 IC 450 In order to prove good faith, the purchaser has got to show that there was real intention on the part of the debtor to pass ownership and on his own part to acquire it Mere delivery of possession is insufficient to establish an intention to pass ownership, *Narayan v Nathu*, AIR 1927 Nag. 166 103 IC 486 In the case of a mortgage executed within two years of the mortgagor's insolvency, the mortgagee has to show that the transaction was effected in good faith and for valuable consideration *Durga Das v Kundan Lal*, 2 Lah. 128 26 Punj L.R. 812 AIR 1926 Lah. 307 91 IC 4 But if the relief claimed by the receiver is time barred that is, if he does not come within the time limit of 2 years the special provisions of this section cannot be exploited for the purpose of throwing the onus on the transferee to prove the bona fides of the transaction, see *Atmaram Udhardas's case*, *supra* When the consideration for the transfer is re-

Questions of presumption
payment of past debts, a presumption of good faith will arise and the onus will be re shifted on to the Receiver to

prove circumstances to warrant an inference that the act of the creditor was an act of bad faith under the Insolvency law, *Official Receiver v Lachmi Bai*, A I R 1926 Sind 140 92 I C 5 "Wherever a voluntary transfer or preference of a creditor on the one hand and adjudication of a transferor or the debtor on the other hand, are brought into contiguity, the law peremptorily requires a certain inference to be made, enquiry is altogether excluded, and the inference will not be allowed to be displaced by any contrary proof, however strong The Insolvency Courts shall presume that the transfer was made or preference shown by the insolvent with the intent to defeat his creditors The presumption to be made is absolute or irrebuttable like the presumption contained in sec 112 of the Evidence Act"—per Venkata Subba Rao, J in *Dronadula Sriramulu v Pona Kavira*, 45 M L J 105 (1923) M W N 306 Where however, all the evidence is before the Court, the question of onus is not of much importance, *Anantarama v Yussuffi*, 36 I C 903, *supra Gopalrao v Hiralal*, A I R 1925 Nag 225 83 I C 246

Circumstances to be considered In order to take a transfer, out of the mischief of the section, both *good faith* and *valuable consideration* have to be proved, [*Mohamed Maliha v Ismail Khan*, 46 C L J 168 A I R 1927 Cal 766 104 I C 822] In determining the question whether a transfer was

Issues to be tried

really *bona fide* or was intended merely for the purpose of screening the property from probable or possible creditors the

Court must take into consideration all the circumstances which surrounded the transaction and the conduct, contemporaneous and subsequent, of the parties, *Ebrahim Bhai v Fulbhai*, 26 Bom 577, *Official Receiver, Tanjore v Veddappa Mudaliar*, 47 M L J 431 20 L W 683 (1924) M W N 506 A I R 1924 Mad 865 82 I C 450 Each fact dealing with the *bona fides* of the transactions is not to be separated from the rest of the facts but the facts should be considered in relation to each other and weighed as a whole, *Seth Ghunsham Das v Umapershad*, 23 C W N 817 21 Bom L R 472 15 N I R 68 50 I C 264 (P C), *Narayan v Nathu*, 10 N L J 12 A I R 1927 Nag 166 103 I C 486 As to what circumstances have to be established in order to make out a case of *fraudulent transfer*, *vide* 47 M L J 431, cited at p 318, *ante* Where a transfer for a dower debt is challenged, the important matters for consideration are (1) the exact amount of the dower due, (2) the nature of the dower debt, (3) *bona fides* of the transfer, (4) the value of the property transferred, (5) the delay in discharging the dower debt, *Mahammad Habibulla v Mushtaq Hussain*, 39 All, 95 14 A L J 1183 37 I C 684

Effect of an application hereunder on a mortgage suit :

The jurisdiction of the Civil Court to try a mortgage suit is not taken away on presentation of an application under this section to annul the mortgage. The proper course in cases where a civil suit is pending on a mortgage and where the Official Receiver applies for annulment of the mortgage under this section would be to have the proceedings in the suit stayed till the disposal of his application by the Insolvency Court, *Official Receiver, Coimbatore v Palanisami Chetty*, 48 Mad , 750 49 M L J 203 (1925) M W N 672 A I R 1925 Mad 1051 88 I C 934

Effect of annulment of adjudication on application hereunder If pending the hearing of an application under this section, the adjudication of the insolvent be annulled the Receiver will have no power to proceed any more with the application, which must necessarily be dropped, *Maung Hme v U Po Seik* 3 Rangoon, 201 Cf *Raj Kishto Singh v Shaik Safatoola*, (1872) 17 W R 85 As to the effect of an annulment under this section of a mortgage upon the decree obtained by the mortgagee in his mortgage suit, see *Official Receiver, Coimbatore v Palanisami Chetty*, 48 Mad , 750 49 M L J 203 (1925) M W N 672 A I R 1925 Mad 1051 88 I C 934

Procedure A proceeding under this section can be started only so long as the insolvency case is pending, see (1920) M W N lxv When a transfer is to be annulled under this section proper notice of the proceeding for annulment is to be given to the transferee, and he should be given a fair opportunity for placing his case before the Court, *Jugalpadda Dutta v Ganesh Chandra* 44 I C 168 (Cal) "The only proper course open to the Court is to issue notice upon the transferee to show cause why the transfer should not be set aside,"

Upendra v Brindaban, 33 I C 188 (Cal)

Notice *Vide notes under "notice" at p 116 , Kunjabehari v Madhusodan*, 50 I C

117 (All) An *ex parte* order can be made only if there is default of appearance notwithstanding the notice, *Kaniz Fatima v Narain Singh* 49 All , 71 24 A L J 897 A I R 1927 All 66 98 I C 1001 The transferee must have also notice of the grounds upon which the transfer in his favour is challenged, *Kauleshar v Bhawan* 42 I C 845 (All) , an order of annulment can be made only upon proper enquires, *Basaruddi Molla v Nazir* 20 C W N clxxxvii (187) An order of annulment should not be made along with order of adjudication, but should be made in a separate proceeding for the purpose, *Appireddi v China Appireddi*, 45 Mad , 189 41 M L J 606 (1921) M W N 816 14 L W 639 66 I C 271 A proceeding under this section can be started on a petition A plaint with *ad valorem* Court fee is not necessary The petition should be

this section has to be dropped if the adjudication is annulled in the meantime unconditionally and without any appointment under sec 37, *Maung Hme v U Po Seik*, 3 Rang 201 AIR 1925 Rang 301

Effect of annulment of Transfer The effect of annulment is that the property vests in the receiver, and becomes available for distribution among the creditors generally, *Re Farnham* (1895) 2 Ch D 800 (808) If a person in whose favour a sale deed is executed by an insolvent, pays off a mortgage on the transferred property he is entitled, on annulment to be entered as a scheduled creditor for the amount paid by him, *Ramprosad v Jaskaran*, AIR 1925 Nag 73 82 IC 489 Having regard to the provisions of sec 2 (e), it seems he can claim, by subrogation, the status of a secured creditor Cf 76 IC 1006 After annulment the alienee can prove as an unsecured creditor to the extent of just antecedent debts *Dev: Dial v Sundar Das*, 65 PR 1919 51 IC 720, vide under sec 54 under the heading "Position of the Alienee after annulment" Unless the transfer is annulled, the Receiver has no right to take possession of the property in the occupation of the transferee, *N N S Chetty Firm v Bailiff, District Court*, 4 Bur LJ 56 AIR 1925 Rang 224 89 IC 61

Effect of decision under the Section A decision under this section (even if *ex parte*) will, by reason of the provisions of sec 4, operate as *res judicata* and bar a subsequent suit by the transferee for a declaration that the transfer in his favour is a valid one, *Kaniz Fatima v Narain Singh*, 49 All 71 24 ALJ 897 Cf *Foolkumari v Khirod Chandra*, 31 CWN 502 AIR 1927 Cal 474 102 IC 115 Vide notes at pp 35-36, ante, also *Allah Baksh v Karim Baksh*, 69 IC 752 (Lah)

Limitation Vide under the heading "Within two years" at p 329 The limitation of two years prescribed in this section is applicable to all cases where the transfer when originally made was a good transaction though subject to an option of avoiding it exercisable by the Receiver, that is to say, to a transfer, which is only *voidable* and not *void*, *Han chand v Motiram*, 48 All 414 24 ALJ 495 94 IC 429 Limitation is counted from the date of execution, and not of registration, of the deed purporting to effect the transfer in question, *Ibid* Art 181 of the Limitation Act is confined to applications under the C P C and does not govern an application by the Receiver under this section, *Rama Suamiah v Subramania*, AIR 1925 Mad 172 79 IC 443 As no period of limitation is prescribed for an application under this section,

it can be made at any time during the pendency of insolvency proceedings, *Duraiya v Venkatarama*, 12 L W 535 60 IC 123, *Duryai Singh v Kunj Lal*, AIR 1924 Lah 553 75 IC 003, see also (1920) M W N 111, *Hemraj Champalal v Ram Krishna*, 2 P L J 101

Appeal An appeal lies to the High Court under sec 75 (1) from an order annulling a voluntary transfer under this section, see Schedule I, *post* also see *Lalji v Abdul* 15 C W N 253 12 C L J 452 Cf 36 IC 771 (Mad), 46 IC 667 (Lah) It seems that no such appeal lies under sec 75 (2) against an order refusing to annul a voluntary transfer Cf *Bhagwant v Munim Khan* 6 N L R 146 8 IC 1115 No second appeal lies from an order under this section annulling a transfer see *Ilahi Jan v Harikishen*, 67 IC 887, for another view see *Seth Sheolal v Girdharilal*, AIR 1924 Nag 361 78 IC 140

54. [§ 37] (1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or

Avoidance of preference in certain cases

suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver and shall be annulled by the Court

(2) This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent

Applicability of the Section This is section 3 of the Act of 1907 and is based upon sec 44 of the Bankruptcy Act 1914 The actual language of the section is taken *verbatim* from the English Bankruptcy Acts and has been unaltered since the year 1869 down to the present date *Bhag an Das v Chutlan Lal* 43 All 47 19 A I J 240 61 IC 32 Like the foregoing section it deals with the effect of adjudication on antecedent transactions Its object is to protect the interests of the whole body of creditors over whom an undue preference

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has been given in favour of other creditors, *Ram Sarup v Jagal Ram*, 2 Lah 102 59 IC 977

Object of the Section Note that under sec 53 of the T P Act, an undue preference of a creditor is not absolutely prohibited, see the cases referred to under sec 5 (c) at p 60, but under this section such preference is void if taking place within three months of the presentation of an insolvency petition followed by an adjudication. Besides, under sec 53 of the T P Act the transaction sought to be impugned must be shown to be actually fraudulent whereas under this section it is

Difference between sec 3 & sec 4 sufficient to show that the transfer has been made with the view of giving preference to one creditor, to whom a debt may be validly due over another creditor, *Balmokard v 13a Singh*, 26 P L R 1912 18 P W R 1912 13 IC 68 Cf *Musalar Salu v Hakim Lal*, Cal 221 23 C L J 406 (P C)—in which their Lordships observed as follows "as a matter of law, their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving other creditors unpaid" But the position is different under the bankruptcy law "It (sec 54) specifies the transactions which are declared void where dominant motive is proved S 53 on the other hand declares all transfers void provided they are within 2 years of the order of adjudication except the ones referred in the exception"—per Rupchand Bilaram A J C in *Re Naraindas Surderdas*, AIR 1926 Sind, 133 93 IC 331 "There is a radical difference between ss 53 and 54 In sec 54, the Court is not concerned with the motive of the transferee but only with that of the debtor It is he who is said to have given the preference and whether the transferee acted in good faith or not is immaterial Where, however, the three months' limitation contemplated by sec 54 has expired it is open to the transferee to prove that whatever the motive of the transferor may have been, he on his part has acted in good faith. And where the consideration of the transfer is past debt, the transferee stands in a better position than otherwise He has his own interest to serve and owes no duty to his other co-creditors to protect their interests"—per Rupchand Bilaram, A C J, in *Official Receiver v Lachmi Bai* 20 S L R 231 AIR 1926 Sind 140 92 IC 5 Where an alienation is challenged, but it is not shown that the alienee is a creditor, the Court should proceed under sec 53, *Appa thoras Odavar v Official Receiver, Tanjore*, AIR 1927 Mad 412 99 IC 68, (Mad) Cf *Istar Das v Latha Ram*, 62 IC 624 Sec 54 has no application where the transferee is not a previous creditor, *Girdhari Lal v Sarab Kishan*, 138 P W.

R 1918 46 I C 667 Notice that sec 53 uses the word "may," whereas this section uses the word "shall." Annulment of transfers under this section can be made at any time during the pendency of insolvency proceedings, *Pirthimath v Bashesharnath*, 69 I C 403 (Lah), vide under the heading "Limitation" at p 35 *infra*.

A preferred creditor was intended by the Indian Legislature to be more leniently dealt with than a voluntary, colourable or fraudulent donee, and hence while the former could escape sec 54 if his preference took place beyond the short period of three months before the date of the presentation of the petition, the Receiver was given two years to attack a mere gratuitous donee's transfer *Sankaranarayana v Alagiri* 35 M L J 296 49 I C 283. But sec 54 is more stringent in one respect, while the transaction is only voidable under sec 53, it is void under this section. Cf *Ussam Kasim v Palat*, 38 I C 231 (Mad), and the other cases cited under the heading "voidable" at p 326 *ante*. Under section 53 the transaction is merely voidable and the Court has a discretion in the matter of annulment, but it is void hereunder and annulment is obligatory as appearing from the word 'shall'.

The fraudulent preference condemned by this section may take any of the forms mentioned in the first part of the section, that is the preference may be shown by means of a transfer effected by the insolvent in favour of the creditor or by a payment made to him or by an obligation incurred in his favour or by taking or suffering a judicial proceeding in the interest of the creditor.

The essential requirements of the section. To render a transaction void under this section four Facts to be proved conditions must be fulfilled—

(i) The debtor must at the date of the transaction be *unable to pay* his debts as they become due from his own money.

(ii) The transaction must be in favour of a creditor or of some person in trust for a creditor.

(iii) The preference should be deliberate, that is the transaction must be effected with the *idea* of giving the creditor a preference over the other creditors.

(iv) The preferential transaction sought to be impeached must take place within three months of the date of the presentation of the insolvency petition followed by an adjudication order see *Vipendra Nath Sahu v Ashutosh Ghose* 21 C L J 167 (170) 19 C W N 157 29 I C 128 *Kalinath v Ambika Proshad* 41 I C 399 (Cal) *Ex parte Cohen*, (1924) 2 Ch 515 (C A) 94 L J (Ch) 73. Or in other words, the debtor must be adjudicated insolvent on a petition presented within t

months of the date of the transaction attacked, see *Ma Khin Pu v Official Receiver*, AIR 1928 Rang 166 113 IC 813

Section applies upon adjudication In absence of an adjudication, the Court cannot assume jurisdiction hereunder, *Mul Singh v Lakshmi Devi* 95 IC 1055 Cf *Appireddi v Chinna Appireddi*, (cited at pp 157 and 328) The section nowhere lays down that the transfer can be annulled only at a particular stage. Anyhow, it is only after an adjudication order has been made that a transfer can be annulled, as otherwise the Court will have no jurisdiction to do so, *Harnam Singh v Gopal Das Des Raj* AIR 1929 Lah 79 109 IC 370 Where the lower Court passed the order of adjudication basing it on the finding that the transfer in question was void as a fraudulent transfer and incorporated the two orders in the same judgment, but recorded the order of annulment in the sentence preceding the order relating to adjudication, held that the error was merely clerical and the order was valid, *ibid* Cf *Appireddi v Chinna*, cited at p 157

Consequences of preference If the foregoing requirements are fulfilled, the transaction showing undue preference shall be deemed fraudulent and void as against the Receiver, and this being *ipso facto* void must necessarily be annulled by the Court. Note that this section uses the word "void," while the preceding section uses the word "voidable." The effect of this difference is obvious.

Sub-sec. (1) : Unable to pay The preference should be shown when the insolvent is in embarrassed circumstances and is unable to pay his debts as they fall due. The words "unable to pay etc" mean that the debtor is insolvent [see *Pearse*, 2 D & C 454, *Ex parte Hill* (1883) 23 Ch D 695, at p 700 Robson p 168] Ability to pay with another man's money does not render the insolvent a capable person. It does not make any difference whether his inability is due to his poverty or to the fact that his money is locked up and not immediately available. *Re Washington D M & Co* (1893) 3 Ch 95, followed in *Nripendra v Ashutosh*, 19 CWN 157 29 IC 128 21 CLJ 167 Cf *Julanath v Parbati Bibi*, 14 Cal 691, also 20 CWN 420. For the meaning of the expression "unable to pay" *Vide* notes and cases at pp 89 and 135 36 Cf *Ghulam Haidar v Durgadas*, AIR 1927 Lah 136 99 IC 7

With a view The insolvent must have the object of giving the creditor a preference, otherwise this section will have no application. Cf *Daulat Ram v Deoki Nandan*, AIR 1924 Lah 686 Without this element of motive, the section will not apply even if the other ingredients are fulfilled, *Kalinath v Ambica Prosad*, 41 IC 399 (Cal), Cf *Labhu Ram v.*

Puranchand, 110 P R 1919 53 I C 421 So where the insolvent makes a payment in the ordinary course of business without any motive for favouring the payee, the transaction cannot be impugned, *Ex parte Hitchcock*, 40 L J N S Chanc. and Banks See also *Rust v Cooper*, Cow 629 A transfer cannot be avoided merely because its effect is to give one creditor preference over other creditors unless the debtor intends to do so, *Moti Mal v Daulat Ram*, A I R 1926 Lah 231 92 I C 296 Every transfer made by a person who is unable to pay his debts does not *ipso facto* become void in the absence of an intention to give preference to the transferee over other creditors, *Firm Mela Ram v Ghulam Dastgir*, A I R 1929 Lah 159 114 I C 200 The payment by a father to his son of the ordinary allowance due to him does not fall within the section The "view" of the insolvent in showing the preference may not be his "sole view", it is quite enough if it is a real and substantial view, *Ex parte Griffith*, 25 Ch D 69, *Ex parte Hill*, 25 Ch D 695 So where the substantial object of an insolvent in making a transfer is to give preference to a creditor, the transaction will be set aside although the motive of the insolvent was to do what he thought right, *Re Fletcher*, 9 Mor 8 That will be so even when the debtor had other motives, provided there is substantial view of giving preference, *Re Bird*, 23 Ch D 695, *New Trustee v Hunting*, (1897) 1 Q B 607 The view to prefer must be proved clearly It is not enough to prove that the creditor was preferred as a matter of fact, *Ex parte Taylor*, 18 Q B D 295 It must be shown that the substantial or dominant object in making the payment was to give preference to a creditor so as to prevent the rateable distribution of the property, *Mohandas v Tikamdas*, 10 S L R 123 37 I C 250 The question whether there has been a fraudulent preference depends not upon the mere fact that there had been a preference but also on the state of mind of the person who made it It must be shown not only that he has preferred a creditor but that he has fraudulently done so It depends upon what was in his mind For this purpose it is not enough that the debtor must be taken to have intended the natural consequences of his acts One must find out what he really did intend, *Sharp v Jackson*, (1899) A C 419 421, *Nripendranath v Ashutosh Ghose*, 43 Cal, 640 (646) 20 C W N 420 33 I C 548 It is not

What is to be proved sufficient to prove that the transfer had the effect of giving preference, it must be proved further that there was the view or intention to give preference, *Official Assignee of Madras v Mitha & Sons*, 42 Mad, 510 36 M L J 190 See also *Boliseti Mamayya v Kolla Kotayya Rice Mill Co*, 40 M L J 570 (1921) M W N. 330 44 Mad 810 63 I C 916, *Bappu Reddiar v Official*

Assignee, Tinnevelly, 37 M L J 246 10 L W 354 (1919) M W N 576 53 I C 642, *Balmokand v Aya Singh*, 26 P L R 1912 18 P W R 1912 13 I C 68 Where the chief motive of the debtor in transferring his property is to benefit himself rather than his creditor, the transaction cannot be considered to be a fraudulent preference under this section, 43 All, 427 (*infra*), *Daulat Ram v Deoki Nandan*, A I R 1924 Lah 686 The proper test to apply in a case like this is to see if the debtor executed the deed with a view to protect himself or with a view to benefit the creditor, *Anunachalam Chettiar v Official Receiver of Tanjore* 22 L W 134 (1925) M W N 561 49 M L J 562 A I R 1925 Mad 1089 91 I C 522 Cf *Bhagwan Das v Chutan Lal*, 19 A L J 240 62 I C 732 Mere suspicion that the transfer was a fraudulent preference is not enough to invoke the provisions of this section, *Nripendra v Ashutosh*, *supra* The state of mind of an insolvent on the date of payment and not on dates prior to it is to be considered for deciding whether a preference to a creditor was intended or not, *Gandabhai v Balkrishna* 32 Bom L R 294 A I R 1930 Bom 217 Where the bankrupt floated a company and transferred his assets to it and under the cloak of the company so floated, by becoming its principal share holder, retained a substantial interest in the said assets, and gave a creditor some interest therein by allotting to him certain shares, the transaction was open to attack under this section, *Re Fasej, Ex parte Trustees*, (1923) 2 Ch D 1, cited at p. 326

When the insolvent acts under pressure and makes payment or does any of the other transactions contemplated by this section it cannot be said that there is a motive for fraudulent preference See *Ex parte Taylor* 18 Q B D 295 *Cush v Cronch*, 11 East, 255, *Mohandas v Tilamdas*, 10 S L R 123 37 I C 250, *supra*

The preference contemplated in this section must be in favour of a creditor, *Girdhari Lal v Sarab Kishen*, 138 P W R 1918 46 I C 677 As to the meaning of the term "creditor", see at p 12 It seems that the word

Meaning of Creditor "Creditor" in this section includes a secured creditor, *Seth Jaskaran v Gorind Prosad* A I R 1922 Nag 233 68 I C 460 But the Calcutta High Court has taken a contrary view, *Jadunath v Manindra*, 27 C W N 816 A I R 1923 Cal 689 80 I C 323 On a careful examination of the provisions of the Act, we feel inclined to maintain that there is nothing in it to warrant the Calcutta view Wherever the Legislature has intended to make a distinction between a secured creditor and an ordinary creditor, in clear terms it has said so, therefore, in the absence of a clear indication by the Legislature to the contrary, we do not see why we should read a qualification in the section which

does not occur there. The word "Creditor" in the section means any person who at the date of payment or transfer is entitled if bankruptcy supervenes, to prove in the bankruptcy and share in the distribution of the bankrupt's estate, *Mazhar v. Punjab Official Receiver* AIR 1928 Rang 166 113 IC.

A person who stands surety for the payment of a debt is not insolvent if a 'creditor' within the meaning of the Act, and a sale to such surety is a fraudulent preference, *Re Debenham & Kamaasami* 40 Mad, 783, 17 B 32 M L J 2.

M W N 238 20 M L T 225 18 I C 783, I B 2
who becomes a creditor only in respect of the transaction
to be impeached as a fraudulent preference is a creditor
the meaning of the section *Bhagwan Das v. Chaudhary*
All, 42 19 A L J 240 6 I C 732 The sum

Transfer in favour of
surety
ference *Saddik Ahmad v M H M Firm*, 2
AIR 193 Rang 149 9 IC 813 Cf *Pe*, 1
2 OB 18

Preference The word 'preference' section means the favouring of one creditor of others. The question whether there has preference depends not upon the mere fact whether there has been a preference but also on the state of mind of the debtor who made it, i.e. to say whether the debtor was actuated by any feeling of bounty towards the creditor or whether he was doing what he did for his own benefit. The test is—did the debtor execute the preference for himself or for the creditor?

Test for deciding the question of preference is the motive and not the result

"preference imports and involves transfer which is not voluntary in act of the insolvent is a preference fraudulent and void as against the P. Co v Pandarimath 30 Bom L.R 222 I.C. 148. In deciding whether preference the Court is bound to look at the result Ibid. When a transaction is within the scope of this section, it was a bona fide one or was a mere gift to the grantor (Gopalrao v Hirji) 83 I.C. 246. Cf (1931) 2 Ch.D. 1. the word preference implies the transferee must be in such a position that he

free choice, *Sharp v Jackson*, (1899) App Cas 419 *Nripendra v Ashutosh*, 21 C L J 167 19 C W N 157 29 I C 128 *Madho Ram v Official Assignee*, 27 C W N 611 *Maula Baksh v Taja Mal*, 11 A L J 545 20 I C 395 The gist of fraudulent preference lies in preferring one creditor to another when the insolvent is unable to meet his liabilities, *Bolisetti Mamayya v Official Receiver, Guntur* 23 L W 10 (1926) M W N 124 A I R 1926 Mad 338 92 I C 726, *Gandabhai v Balkrishna*, 32 Bom L R 294 A I R 1930 Bom 217 But the mere payment of a debt by a debtor in imminent expectation of bankruptcy is not by itself sufficient to prove the intention to give preference, *Ramchand v Parmanand*, A I R 1928 Lah 744 110 I C 824 This section does not avoid a transfer merely because its effect is to give one creditor preference over other creditors, but makes the intention of the debtor the dominant factor in deciding the fate of the transaction *Moti Mal Ram Sarup v Daulat Ram*, A I R 1926 Lah 231 92 I C 296 It is not sufficient to prove that the transfer had the effect of giving preference

Look to the view
motive and not the
result

to a creditor, it must be proved further that there was the intention to give that creditor a preference before a transfer can be avoided under this

section, *Bolisetti Mamayya v Kolla Kottappa*, 44 Mad, 810 40 M L J 570 (1921) M W N 330 29 M L T 288 14 L W 428 63 I C 916, *Sharpe v Jackson*, (1899) A C 419, *Nripendra v Ashutosh*, 43 Cal 640, *Official Assignee v Mehta & Sons* 42 Mad 510, *Arunachalam v Official Receiver*, 49 M L J 562 (564) that is the Court is bound to look to the view or motive and not the result or effect, *Strenoltyper Ltd*, (1901) 1 Ch 250 Preference

No Preference where
the debtor acts under
pressure e.g. threat of
prosecution exposure
etc

must be intended and not merely incidental *Gandabhai v Balkrishna* 32 Bom L R 294 A I R 1920 Bom 217 There is no preference when the insolvent acts under pressure, *Ex parte*

Taylor, 18 Q B D 295 *Cush v Cronch*, 11 East 255 The very implication of preference is a voluntary act free from such extraneous influences as pressure or threats from creditors *Ram Chand v Parmanand*, A I R 1928 Lah 744 110 I C 824 When the supposed preference is due to the pressure put by the creditor, alleged to be favoured, upon the insolvent, there is no application for this section, *Joakim v Secretary of State*, 3 All, 530, *Official Receiver v Nalla Perumal*, 1929 M W N 327 A I R 1929 Mad 471 119 I C 708 Where an insolvent in embarrassed circumstances makes a genuine effort to set right his financial position without admitting defeat and obtains an useful assistance from a bank for the purpose, but in obtain-

ing such assistance he is made, under pressure, to execute a security bond in favour of the bank, there is no preference within the meaning of this section in favour of the bank, *Kasi Iyer v Official Receiver, Tanjore*, AIR 1929 Mad 821 124 IC 213 When there is pressure by several creditors, and one of them is preferred, the Court cannot enter into the question of degree of pressure brought to bear on the insolvent by the different creditors, *Official Receiver v Nalla Perumal, supra* A transaction entered into under a threat of criminal prosecution is not voluntary and does not amount to a fraudulent preference, *Umrao Singh v Punjab National Bank Ltd*, 3 Lah LJ 44 59 IC 576 The threat of legal proceeding, whether civil or criminal constitutes pressure, *Nipendra v Ashutosh*, 43 Cal, 640 (647) 20 CWN 420 33 IC 548, especially when the debtor is on the verge of bankruptcy, *Arunachalam Chettiar v Official Receiver of Tanjore*, 49 MLJ 562 AIR 1925 Mad 1089 91 IC 522, (*supra*) Thus, where the debtor misappropriated certain amounts sent to them for the purchase of *hundis* and executed a sale deed of their house under threat of criminal prosecution being launched against them, the sale-deed did not amount to a fraudulent preference, *Sholapur Spinning & Weaving Co v Pandarinath* 30 Bom LR 893 AIR 1928 Bom 341 113 IC 148 As to when a threat of legal proceedings may not constitute pressure, *vide Ibid* A constant demand for payment is not pressure, *Madhoram v Official Assignee*, 27 CWN 611 When the insolvent acts from fear of legal proceedings there is no preference, *Thompson v Freeman*, 1 TR 155, *Ex parte Taylor*, 18 QBD 295, *Sharpe v Jackson*, (1899) AC 419 Also Cf *Lachman Singh v Mohan*, 2 All, 497, *Sheo Prosad v Miller*, 2 All, 474, *Brown v Fergusson*, 16 Mad, 499, *Ex parte Harsukhdas* 39 CLJ 512 AIR 1924 Cal 946 Where a creditor held possibilities of insolvency proceedings *in terrorem* over the head of the debtor and thereby induced the latter to come to a special arrangement with him, there was no fraudulent preference as the transaction was the result of pressure, *Mansookhlal Dolat Chand v Nagardass Mool Chand*, 6 Rang 536 AIR 1928 Rang 302 117 IC 569 A mortgage executed in favour of a creditor in order to save oneself from exposure and legal proceedings is not a preference, *Puranchand v Puranchand*, AIR 1923 Lah 652 75 IC 441, Cf *Ex parte Taylor*, *Re Goldsmith* 18 QBD 205 But the alleged pressure must have been real, that is, it must have operated on the mind of the debtor as the dominant influence affecting him, *Re Boyd* (1889) 6 Morrell, 209, *Re Fell* (1892) 10 Morrell, 15 Cf *Ex parte Hall*, 19 Ch D 480 Where the alleged pressure is no pressure, the preference will be open to attack, *Miller v Sheo Prosad*, 10 IA, 98 6 All, 84 Where the so-called

pressure is such as can easily be resisted, the transaction will be considered as voluntary and therefore void, *Phulchand v Miller* 7 All , 340 In order that the payment may be voluntary there should be neither outside pressure nor even inward mental apprehension of such pressure, *Gandabhai v Balprishna*, 32 Bom L R 294 Where the pressure is fraudulent, it does not count for anything, *Ex parte Reader* (1875), L R 20 Eq 763 *Miller v Sheo Prosad*, 10 I A 98 6 All , 84 However, pressure being of least consequence to one on the verge of insolvency, it does not always preclude the possibility of preferential treatment of the creditor by the debtor, *In re Cooper*, (1882) 19 Ch D 580 Where pressure is the result of a pre concerted plan of the creditor and the insolvent, it cannot negative the existence of preference, *Strachan v Barton* 11 Lx 64~ For *contra* see *Belcher v Jones*, 2 M and W 258 There is no preference where the transaction in favour of the creditor is the result of a previous binding contract, *Ex parte Hodgken* 20 Eq 716 Where money is paid to a creditor under a *prior arrangement* there is no question of

No preference where the bargain is the result of prior agreement

fraudulent preference, *Maula Baksh v Taja Mal* 11 A L J 545 20 I C 395 Cf *Nripendranath v Asutosh*, 19 C W N 15~, *supra* , *Bills v Smith*, 34 L J

Q B 68 Creditors who from the outset bargain for their debtors giving security for their debts have a right to insist on security being given to them for their debts and the act of the insolvents in executing mortgages to such creditors would not amount to fraudulent preference, even when other creditors are equally pressing for payment of their money, *Official Receiver v Nallaperumal*, (1929) M W N 327 A I R 1929 Mad 471 119 I C 708 The suggestion of preferential treatment is not repelled where the debtor acts from motives of kindness or of gratitude, or is moved by a mere sense of honour or a sense of duty, or of moral obligation at the time of the transaction *Re Fletcher* (1891), 9 Morrell 8 , *Re Vingoe*, (1894) 1 Mynson 416 *Re Blackburn* (1899) 2 Ch 725, referred to in *Ex parte Topham*, L R 18 Ch 614 "I cannot help thinking that if a creditor takes the whole or, substantially the whole of debtor's property, in payment of a past debt knowing that there are creditors he cannot be said to be acting in good faith" per Wright J in *Re Jukes*, (1902) 2 K B 58 See also *Daolat v Panduram*, 55 I C 57 (Nag) The repayment of a debt, not yet due to a near relative by a person in

Or the payment is to make good breach of trust

insolvent circumstances amounts to undue preference, *Daolat v Panduram*, 55 I C 57 (Nag) , *Gopal Hiralal*, A I R 1925 Nag 225 83 I C 246 Cf

74 I C 802 (Oudh) There is no preference where the mis-

applied trust money is restored, replaced or repaid, such repayment serves to repair a wrong done, or to mitigate the consequence of a breach of trust *Ex parte Stubbins*, (1881) 17 Ch D 58, *Ex parte Taylor*, (1886) 18 Q B D 295

In ascertaining whether a particular transaction is open to attack as a fraudulent preference, it must be provided that the transaction in question was carried out with the substantial or dominant view of giving the creditor a preference over the other creditors, *Nripendra v*

Ashutosh 21 C L J 170, 19 C W N 157, 29 I C 128, *In re Mithomal Dacka Das*, 9 S L R 65 31 I C 50, also *Daulat Ram v Deoki Nandan*, A I R 1924 Lah 686, *Angappa Chetty v Naniappa*, 18 M L J 189 2 M L T 57 Note that it is the dominant or substantial view, and not necessarily the sole view that counts *Re Cohen*, (1924) 2 Ch 515 (535) In order to impeach an alienation as a fraudulent preference, it must be shown that the insolvent had the dominant idea of cheating his other creditors by preferring a particular creditor, *Ramasami Aringar v Official Receiver, Coimbatore*, 50 M L J 448 1926 M W N 419 94 I C 535 The view of preferring however need not be the whole view, it will do if it is the dominant view *In re L W Nasse*, 7 Rang 201 A I R 1929 Rang 229 118 I C 615 (a case under Presi Town Insolv Act) Where a security given to a creditor is attacked as a fraudulent preference what has to be decided is what was the dominant intention in the mind of the insolvent at the time the act was done It cannot be avoided as a fraudulent preference if the main motive was to obtain a benefit for himself in the shape of a further advance though the result is preference in favour of that creditor, *Raeburn & Co, v Zellikoffer & Co*, 2 Rangoon, 193 A I R 1924 Rang 308 83 I C 440 Cf *Puranchand v Puranchand*, A I R 1923 Lah 652 75 I C 441 In every case the state of the mind of the debtor is the paramount consideration The intention or view to prefer the creditor as the *causa causans* of the debtor's conduct is the cardinal point round which the whole question turns, *Re Ramsay*, (1913) 2 K B 80 (84) Also see *Sharpe v Jackson*, (1899) App Cas 419—on appeal from *New Prince & Garrad's Trustee, v Hunting*, (1897) 2 Q B 19, *Ex parte Topham*, 8 Ch App 614, *Kalinath v Ambica* 41 I C 399 The Court has always to determine whether the dominant motive actuating the debtor in making the transfer was a desire to prefer a particular creditor, *Kasi Iyer v Official Receiver*, A I R 1929 Mad 821 124 I C 213, *Sime Darby & Co v Official Assignee*, 47 C L J 339 54 M L J 337 A I R 1928 P C 77 107 I C 233 (P C); *Nagarathna Mudaliar v Chidambaram*, A I R 1928 Mad 860 (1928) M W N 617 113 I C 129 If the Court after inquiry

finds that the insolvent's dominant motive in making the transfer was to prefer one particular creditor over others, then the transaction amounts to a fraudulent preference, *Ibid*. Every transfer by the insolvent does not *ipso facto* become void in the absence of an *intention* of giving the transferee a preference over the other creditors, *Mela Ram v Ghulam Dastgir*, A I R 1929 Lah 159 114 I C 709. A mere transfer of property or payment made to one of several creditors is not "a preference over other creditors" unless the dominant intention of the insolvent was to give undue advantage to that creditor and thereby to defraud others. What the intention was is a question of fact to be decided from the circumstances of each case. *Official Receiver v Nalla Perumal*, (1929) M W N 327 A I R 1929 Mad 471 119 I C 708. If in making the transfer, the debtor did not really *intend* to prefer the creditor or to confer any benefit on him, but the dominant motive or object which influenced the debtor was the desire to secure a benefit for himself, the transaction does not amount to a fraudulent preference, *Bhagwan Das v Chuttan Lal*, 43 All 427 19 A L J 240 62 I C 732. If the transaction is a spontaneous act of the debtor uninfluenced by any circumstances which can tend to rebut the presumption that the bankrupt made a distinction among his creditors, it will amount to a fraudulent preference, *Ex parte Tempest*, (1870) 6 Ch App 70, *Bills v Smith*, 6 B and S 314. A transaction cannot be deemed to be a spontaneous act, if it is established that it was the result of real pressure brought to bear by a creditor on his debtor. *Nripendra v Ashutosh*, 43 Cal 640 20 C W N 420. A presumption as to intention to give preference to a creditor may arise from circumstances, *Mela Ram v Ghulam Dastgir*, A I R 1929 Lah 159 114 I C 709. Where a so-called payment is no *voluntary* payment by the insolvent, but is in substance a conversion effected by the creditor, there is no preference, *Official Assignee v O R M & Firm*, 52 M L J

Intention of insolvent relevant and that of creditor, immaterial

352. Under this section good faith on the part of the creditor affords him no protection, where the intention of the debtor to give him a preference is established, *Nripendra v Ashutosh*, 19

C W N 157 29 I C 128 21 C L J 157 (173), see *Davidson v Robinson*, 3 Jur N S 791, *Butcher v Stead*, (1875) L R 7 H L 839, *Sharpe v Jackson*, (1899) App Cas 419. It is the intention of the insolvent that is relevant under this section, and not that of the transferee, *Harnam Singh v Gopal Das*, A I R Lah 79 109 I C 370. The intention or motive of the creditor preferred is immaterial. Even if the creditor takes a *bona fide* sale from the insolvent in discharge of a debt due to him that does not make the transaction a valid transaction

if the intention or the view of the insolvent is to prefer that creditor to others, *Bolisetti Mamanna v Official Receiver, Guntur*, (1926) M W N 124 A I R 1926 Mad 338 23 L W 10 92 I C 726 "The creditor, although entirely innocent of consciously having done anything against the bankrupt law, is legally liable to repay the money to the trustee in bankruptcy in order that the other creditors may share in that money which was paid away on the eve of the bankruptcy," *In re Cohen*, (1924) 2 Ch 515 (520, 522) A transferee will not be within the mischief of this section merely by reason of his knowledge of the insolvent condition of the debtor or by reason of his failure to see to the disposal of the purchase money, *Kalinath v Ambica Prasad* 41 I C 399 Cf *Mohandas v Tikamdas*, 10 S L R 123 37 I C 250 A transfer is void when its effect is to leave the debtor without the means of paying his present debts, *Chidambaram v Srinivasa*, 37 Mad 227 (P C) 20 C L J 571 18 C W N 841 Cf *Dadoba v Ishnudas* cited at p 60 ante

A debtor, unable to pay his debts, executed a mortgage of his whole valuable assets in favour of some of his creditors in full satisfaction of their claim, and himself received a portion of the mortgage money in cash. Within three months from the date of the transaction the debtor was adjudicated an insolvent on the application of the other creditors, held that the transfer was made with a view to giving preference to some creditors and was therefore liable to be annulled, *Balmokand v Aya Singh*, 18 P W R 1912 26 P L R 1912 13 I C 68 Where a mortgage, whereby the possession of all the property is handed over to the creditor, has the effect of giving the creditor a preference over other creditors the mortgage deed being executed within 3 months of the application for adjudication comes hereunder and the execution of the mortgage deed amounts to an act of insolvency under sec 6 (b), *Krishna Das v Raja Ram*, 1930 A L J 370 A I R 1930 All 282 If a creditor purchases the property of an insolvent in lieu of the balance of the account due to him, the transaction falls under this section, *Vithal v Gopal* A I R 1922 Nag 260 69 I C 556 A payment amounts to a fraudulent preference under this section when it is voluntary and is a deliberate preference of one creditor over others, *Gandabhai v Balkrishna* 32 Bom L R 294 Where a debtor could secure a loan from an old creditor only by giving security for all the debts due and he effected a mortgage, it is not a fraudulent preference, as there was a pressing necessity, *Daulat Ram v Deokinandan*, A I R 1924 Lah 686 75 I C 861 Where a debtor, who being unable to meet his difficulties stands in need of further accommodation and a creditor takes a mortgage covering both the new and old debts, it will not be a case of preference, 111

Mal Ram Sarup v Daulat Ram AIR 1926 Lah 231 92 IC 296, see also *Kasi Iyer v Official Receiver Tanjore*, AIR 1929 Mad 821. So far as moveable property is concerned mere preference of one creditor at the expense of another if he is not injuriously affected will not make the transaction void or voidable under any law except Insolvency law, *Subhara Pillay v Subramanian* AIR 1929 Rang 110 118 IC 401. A fraudulent arrangement between a seller of goods and the insolvent by which the goods were left in the manual power of the insolvent only for the purpose of postponing other creditors is a preference and cannot be upheld *Comp Nripendra Kumar Bose, In re* 56 Cal 1074, *Murray, In re*, 3 Cal 58, 62.

Preference by means of suffering a judicial proceeding arises when, for instance, a debtor 'Suffer a judicial proceeding' allows a judgment to be passed against him by default, or in collusion with a plaintiff, or when he confesses judgment or consents to a decree. A judgment by sufferance, however, will not operate as a fraudulent preference when the suit was commenced at a time when there was no other creditor to take bankruptcy proceedings *Ex parte Lancaster Re Marsden*, (1883) 25 Ch D 311—ref to in 25 Bom 202 (214) Cf 93 IC 331 (Sind). When the judgment debtor has no great stake in life he may allow collusive decrees to be made against him so that the dividends of genuine creditors may, on bankruptcy, be reduced thereby, it is because of this reason that a decree against the insolvent has been held not to be binding upon the receiver, [see *Mir Shahamat v Rahim Bux*, AIR 1925 All 33 84 IC 1008], or that an Insolvency Court has been held entitled to go behind a judgment debt [vide p 217]. As to consent decrees vide *infra*.

Good Faith A creditor, who takes the whole or substantially the whole of the property of his debtor in payment of a past debt, and with knowledge of the existence of other creditors cannot be said to be acting in good faith, *Ex parte Jules*, (1902) 2 K.B 58 71 L.J.K.B 710. Vide the observation of Wright J quoted at p 348, *ante*. Similarly, a near relation of the insolvent purchasing the insolvent's entire property with notice of the insolvency cannot be said to be acting in good faith, *Daolat v Panduram* 55 IC 57 (Nag). In case of repayment of a debt not yet due, *bona fides* of the transaction have to be proved. Mere proof of passing of consideration will not do, *Gopal v Hiralal*, AIR 1925 Nag 225 83 IC 246. The mere fact that valuable consideration has been paid for the transfer does not necessarily lead to an inference of good faith, *Gopal v Ramkrishna*, AIR 1921 Nag 103 17 N.L.R 69, *Narayan v Nathu*, 10 N.L.J 12 AIR 1927

Nag 166 If the transaction is a mere cloak for retaining a benefit to the debtor or if it gives undue or fraudulent preference, it will be wholly void even though supported by consideration, *Ibid* When a question of *good faith* is at issue all the surrounding facts should be weighed as a whole and not in isolation from one another, *Seth Ghunsamdas v Umapershad*, 23 C W N 817, P C , also cited at p 354, *supra* See also *Narayan v Nathu* A I R 1927 Nag 166

Decree against insolvent not binding upon Receiver :

A decree obtained against the insolvent is not binding against the receiver in insolvency, as it might possibly be a collusive affair, and the insolvent might not care whether he has decrees for an unlimited amount against him or not, *Mir Shahamat v Rahim Bux*, A I R 1925 All 33 84 I C 1008 Cf *Kalachand v Jagannath*, cited at p 201

Consent Decree

A consent decree has no greater sanctity than a contract between the parties and the Insolvency Court has jurisdiction to examine the *bona fides* thereof If such a decree is challenged under this section the question for consideration by the Court would be as to the dominant motive of the debtor, if challenged under sec 53 the question would be, whatever might be the dominant motive of the transferor whether the transferee acted in good faith, *Re Narindas Sunderdas* 93 I C 331 (Sind) Cf *Mackintosh v Pogose* (1895) 1 Ch D 505

Liability of Agent making a preferential payment :

An agent, who with a full knowledge of the bankruptcy of his principal makes payment to a creditor and thus gives him a fraudulent preference, will be liable to the trustee in bankruptcy for the amount so paid by him, *Re Morant* (1924) 1 Ch 79, but he will be protected if he makes payment in good faith, *Ibid*

Limitation

An application for annulment under this section can be made at any time during the pendency of the insolvency proceedings, the right to do so being one that accrued from day to day, *Pirthu Nath v Basheshwar Nath* 69 I C 403 (Lah), followed in *Daryal Singh v Kanai Lal*, 75 I C 996, which has held that where the Court chooses to take action itself under this section or is moved by the Receiver or by a creditor, it is not bound by any period of limitation It has been said that Art 181 of Sch I of the Limitation Act has no application to such proceedings therefore there is no period of limitation for an application under this section, *vide Hemraj Champalal v Ramkrishna Ram*, (1917) 2 P L J 101. So, it has been maintained that delay in making an application hereunder is not fatal, comp *Abdul Kader v Official Assignee*,

25 M L J 320 20 I C 482 But see *Nikka Mal v Marwari Bank Ltd Lahore*, 151 P R 1919 52 I C 188, which says (very reasonably) that the limitation for such an application is three years from the date when the right to apply accrues, that is, from the date of the adjudication. Of course the question of limitation in this direction is not altogether free from difficulty, but we fail to see why there should not be some sort of time limit in order to quiet stale claims or to make up for the loss of evidence by lapse of time. The fact of the *pendency* of the proceedings may have some bearing on the question (69 I C 403, *supra*), but that will not be an infallible guide for determining the limitation inasmuch as insolvency proceedings come to an end with the discharge of the bankrupt which is itself an uncertain event in point of time and the question of annulment ought not to be made dependent on such a precarious circumstance.

Mode of computing the time-limit of 3 months In calculating the period of three months, mentioned in the section the day of the presentation of the petition is excluded, *Re Dawes Ex parte Official Receiver*, (1897) 4 Mans 117. It should be noticed that the date of presentation of the insolvency petition is the *terminus a quo* for the purpose of computing the period of three months prescribed by the section. In the case of a bankruptcy petition by creditors the date of its presentation is the date on which the requisite number of creditors join to make up the statutory aggregate amount of Rs 500/, see *Sohan Lal v Sheonath*, cited at p 76, under the heading "Aggregate amount".

Void Under the Act of 1907 this word was interpreted to mean "voidable", see *Ussam Kasim v Palat Mammad* 38 I C 231 (Mad). But now comparing the language of this section with that of section 53 this view cannot any more be maintained. According to the old interpretation, a transaction unless actually impeached would stand good. So, it was held that the Receiver could not object to the execution of a decree by an assignee under O XXI, r 16 of C P Code, unless he had obtained an order of annulment under this section, *Ussam Kasim v Palat supra*. But under the present Act, the transaction being altogether void (if within 3 months), the Receiver it seems can take exception even before actual annulment. *vide* notes under the heading "Voidable" at p 326, *ante*.

Plea of Fraudulent Preference by Debtor outside Insolvency Court A plea of fraudulent preference set up by a debtor not in the interests of the creditors in general, but to avoid his own obligation, is of no avail except perhaps in the Insolvency Court, *Mohandas Thakurdas v Tikamdas*, 10 S L R 123 37 I C 250.

Jurisdiction of Court other than Insolvency Court to determine question of fraudulent preference Where a suit for specific performance of a contract entered previous to his insolvency is brought against an insolvent in a Court other than the Court of insolvency, such a Court has no jurisdiction to determine the question of fraudulent preference, *Nagarathna Mudaliar v Chidambaram*, (1928) M W N 617 A I R 1928 Mad 860 113 I C 129

✓ **Receiver may recover payment from person preferred :** When a transaction is set aside as a fraudulent preference under this section, the receiver will be entitled to claim recovery of the money actually paid to the person preferred, *Re Stanley & Co*, 94 L J (Ch) 187 (1925) 1 Ch 148

Position of the Alienee after avoidance of transfer : The alienee can prove for what may be due to him from the insolvent by way of refund of the consideration, if any, *Devu Dial v Sundar Das*, 151 P R 1919 65 P R 1919 51 I C 720 This principle holds good also in respect of sec 53, *vide* at p 338, *ante*

Effect of annulment *vide* under the last heading, also notes at p 338, *ante* As to the effect of order of annulment, being incorporated in the order of adjudication *vide* under the heading "section applies upon adjudication," at p 342, also Comp *Appireddi v Chinna* cited at p 157, *ante*

Procedure and Evidence The Receiver is the proper person to make an application for annulment under this section, *Nikka Mal v Marwar Bank*, 52 I C 188 But where the receiver fails to move in the matter, a proceeding can be started by the creditor (*Ibid*) *vide* sec 54A and the cases thereunder Before setting the law on motion under this section, the Receiver can ask for indemnity for his costs from the creditor who wants him to impugn the transaction If he fails in the District Court he can carry the matter to the appellate Court, *Anantanarayana v Ramsubba*, 47 Mad 673 18 L W 857 A I R 1924 Mad 345 79 I C 395 Likewise a creditor is competent to move where no receiver is appointed, *Gopalrao v Hiralal*, A I R 1925 Nag 225 85 I C 246, *Nikka Mal v Marwar Bank Ltd*, *supra* The petition for the purpose must be properly stamped Also read the notes under "Procedure" at p 335 The transferee is always a necessary party Cf *Jagannath v Narain*, 52 I C 761 In deciding the question of motive, any act of the debtor at or about the time, any matter in *pari materia* may be looked into to see what was passing in his mind, *Arunachalam Chettiar v Official Receiver of Tanjore*, 49 M L J 562 (*infra*) The question of domin motive is a question of fact, see *Kasi Iyer v Official Receiver*

Tanjore, AIR 1929 Mad 821 But as the solution of the question involves an enquiry into the state of a man's mind, direct evidence will scarcely be available and the decision will generally depend on inferences to be drawn from circumstances, *Sime Darby & Co v Official Assignee*, 47 CLJ 339 30 Bom LR 290 54 MLJ 337 (PC), *infra* In a Madras case it has been held that in impugning a sale under this section evidence given at the insolvency proceedings can be used against the purchaser, though he was not a party thereto, *Gangala Ramakottaya v Bhimarappa*, 23 IC 597 (Mad) But how evidence can be used against a party who had no opportunity to rebut it or test it by cross examination really passes our comprehension In deciding whether a transaction was entered into in good faith or not, it is a mistake to take each fact which militates against the *bona fides* of the transaction separated from the rest of the facts and to proceed to demonstrate that it is quite consistent with good faith The Judicial Committee have condemned this process (almost invariably adopted by our Courts) of arriving at a conclusion on the question of good faith and have held that in such a case all the circumstances should be considered in relation to each other and weighed as a whole, *Seth Ghunsham v Uma Pershad*, 23 CWN 817 21 Bom LR 472 50 IC 264 (PC) and other cases cited at p 334 The mere fact that the act was done shortly before the filing of the insolvency petition raises no doubt a presumption of fraudulent preference, but it is necessary to consider all the facts in the case and to arrive at a decision as to what was the principal object of the insolvent in so acting, *Raeburn Co v Zollhofer*, 2 Rang 193 AIR 1924 Rang 308 83 IC 440 As to how far Receiver's Report will be evidence read *Basant Bai v Nanhe Mal*, AIR 1926 All 29 89 IC 357

Procedure not summary An order passed under this section is not a summary order, but a considered order passed after allowing the assignee all the facilities of a regular suit for adducing evidence, *Allah Baksh v Karim Baksh* AIR 1922 Lah 214 69 IC 752 A proceeding to set aside a transaction as a fraudulent preference should be tried as if it were an *action* The case should be opened on behalf of the Receiver and his report read as if it were a pleading He must then call in his evidence and make out his case like any plaintiff Then, the case for the other side should be opened and the matter tried, *Samu Pallar v Wilson*, 18 LW 696 73 IC 532

Proceeding hereunder may be continued even after annulment of adjudication: A proceeding under this section remains pending and may be continued even after annulment

of adjudication, *Jethaji Peraji Firm v Krishnayya*, 52 Mad 648 57 M L J 116 (1929) M W N 489 A I R 1930 Mad 278

Burden of Proof Where an act is impeached as a fraudulent preference, the onus of proof lies on the Receiver, *Bapfu Reddiar v Official Assignee* 37 M L J 246 10 L W 354 (1919) M W N 576 53 I C 642, *Firm Mela Ram v Ghulam Dostier*, A I R 1929 Lah 159 114 I C 700, *Ex parte Topham, Re Walker*, (1873) 8 Ch 614, *Ex parte Griffith, Re Wilcox* (1883) 23 Ch D 69, *Ex parte Lancaster, Re Marsden*, (1883) 25 Ch D 311 (319), *Kasi Iyer v Official Receiver, Tanjore*, A I R 1929 Mad 821 124 I C 213, *Sime Darby & Co v Official Assignee* 47 C L J 339 30 Bom L R 290 54 M L J 337 A I R 1928 P C 77 107 I C 233 (P C), *Ma Ahin v Official Receiver*, A I R 1928 Rang 166 113 I C 813 Thus there is a consensus of authority in England as well as in India that the initial onus is on the person challenging an alienation under this section to prove that it was made with the dominant view of giving the particular creditors preference over others *Ram Chand v Pirma Nand* A I R 1928 Lah 744 110 I C 824 Therefore the onus is in the first instance on the Official Receiver to prove that the dominant or the substantial or effective though not necessarily the sole, motive which the insolvent had in view was to prefer a particular creditor, *Nehaldas v Official Receiver* 107 I C 210 Cf *In re L H Nasse* 7 Rang 201 A I R 1929 Rang 229 118 I C 615 See also *Williams on Bankruptcy* 10th Ed p 303 The burden of proof lies on the receiver even if the debtor was insolvent at the time of the transaction and knew him to be so, *Re Laurie, Ex parte Green*, (1898) 6 Manson, 48 As to when the onus may possibly shift, see *Re Ealon & Co, Ex Viney*, (1897) 2 Q B 16 (17) *Sharp v Jackson* (1899) A C 419, *Ex parte Tate* (1876) 55 L T 531 *Re Lake* (1901) 1 K B 710 The onus is shifted on to the creditor or transferee to prove the contrary where the insolvent has made the payment or transfer of property (as the case may be) in discharge of an old debt and on the eve of bankruptcy, *Nehaldas v Official Receiver* 107 I C 210 If it is established that the payment is made of the debtor's own accord and not in the ordinary course of business and without any sort of pressure being brought to bear upon him and that the debtor was on the eve of bankruptcy, the onus shifts on to the creditor to show that the payment was not made with a view to prefer him,—per Rattigan C J in *Iabhu Ram v Puranchand* 130 P R 1919 53 I C 421 Cf *Madho Ram v Official Assignee*, 27 C W N 611 Cf *Gopalrao v Hiralal* A I R 1925 Nag 225 83 I C 246 The initial burden of proof is always on the Official Receiver to give some evidence of a view to prefer,

Arunachalam Chettiar v Official Receiver, 49 M L J 562 22 L W 134 (1925) M W N 561 A I R 1925 Mad 1089 91 I C 522 Where the Receiver challenges a transaction as a fraudulent preference, he must show that by evidence apart from the mere fact that the transferor was insolvent, *Janaki Ram v Official Receiver, Coimbatore supra* It has been held in a recent case that when a receiver seeks to impugn a transaction under this section, the onus is on him to show that it was an outcome of a fraudulent preference, *Nripendra v Ashutosh*, 21 C L J 167 19 C W N 175 29 I C 128, *Janaki Ram v Official Receiver Coimbatore* A I R 1925 Mad 328 78 I C 16, *Daulat Ram v Deokinandan* A I R 1924 Lah 686 Also see *Nripendra v Ashutosh* 43 Cal 640 20 C W N 420 33 I C 548, *Official Assignee of Madras v Mehta and sons* 42 Mad, 510 (1919) M W N 293 49 I C 968 36 M L J 190 (1919) M W N 246 *Bappu Reddiar v The Official Assignee Tinnevely* 37 M L J 246 (1919) M W N 576 The onus of proving that certain payments were made by an insolvent with the motive of giving fraudulent preference to a creditor lies in the first instance on the Official Receiver But where such payments were made on the eve of insolvency and no explanation is given for making the same, a *prima facie* presumption would arise in favour of the Official Receiver and the burden of proving the contrary would shift on to the insolvent *Official Receiver v Ke almalajumal* A I R 1926 Sind 123 93 I C 372 Cf *Re Lake Ex parte Dyer* (1901) 1 K B 10 (71) where the receiver has made out a *prima facie* case of fraudulent preference and there is no evidence to the contrary he is entitled to succeed *Re Cohen Ex parte Trustee* (1924) 2 Ch 515, because, it is then incumbent on the insolvent to displace that *prima facie* evidence by proving pressure or so forth *Re Ramsay* (1913) 2 K B 80 There is a suspicion of fraud where an insolvent executes a deed of gift a few days before filing his application for adjudication whatever the declaration in the deed of gift may be *Husam v Muhammad Zamir Ibedi* 9 O & A L R 440 26 O C 319 74 I C 80 We have already seen above that a question of intention or motive always involves an enquiry into the state of a man's mind and as direct evidence on the point is seldom available its decision therefore must in a majority of cases depend on circumstantial evidence *Sime Darby & Co v Official Assignee infra* In this connection read the observations in *Seth Gurusamdas v Umapershad* [cited at p 356] disapproving the method of taking each fact militating against the *bona fides* of a transaction in isolation from the other facts In the case of fraudulent preference it is not necessary for the Receiver to make out that the property was under valued He has only to make out the intention of the insolvent, *Boliseti*

Mamanna v Official Receiver, Guntur, (1926) M W N 124
A I R 1926 Mad 338 23 L W 10 92 I C 726

In the stage of appeal, when all the evidence is before the Court, the question of the burden of proof is not of great importance, *Gopalrao v Hirralal*, A I R 1925 Nag 225 83 I C 246, see also at p 334. When all the circumstances have been ascertained so far as the parties have thought fit to ascertain them, discussion on the question of onus becomes immaterial, *Simc Darby & Co v Official Assignee* 47 C L J 339 54 M L J 337 30 Bom L R 290 A I R 1928 P C 77 - 107 I C 233 (P C)

Use of affidavits Unless an affidavit is actually used by a party, the Receiver cannot rely on any admission in it, *Ex parte Cohen*, (1924) 2 Ch 515 (C A) 94 L J (Ch) 73

Regular suit barred A decision under this section will preclude a fresh agitation over the question by means of a regular suit, *Allah Baksh v Karim Balsh supra*, Cf 42 Mad 322, 29 All 626, 49 All 71 (cited at p 338), 24 A L J 897, 69 I C 752

Sub-sec (2): Bonafide transferee from creditor for value Such a transferee is not hit by the section, see *Butcher v Stead* L R - H L 830 (on appeal from 18,4 9 Ch App 595). But the sub section does not afford any protection to a transferee who neither acts in good faith, nor pays any value. Therefore a *benamdar* of the preferred creditor gets no protection, *Jagannath v Narain* 52 I C 761. Similarly, there is no protection where the transfer is a mere colourable transaction, *Ibid* Cf (1877) 3 A C 213 (226)

Appeal An appeal lies to the High Court under sec 75 (2) and Sch I from a decision that a transfer of property is a preference in favour of a creditor. So an order as aforesaid is not *final* in the sense that it is appealable, *Allah Bal sh v Karim Baksh*, A I R 1922 Lah 214 69 I C 752. From the wording of Schedule I it seems that no appeal lies to the High Court when the decision is *no* preference, though it may plausibly be contended that the decision falls within the scope of sec 4 and will be appealable on that account.

54A. [New] A petition for the annulment of any transfer under section 53, or of any transfer, payment, obligation or judicial proceeding under section 54, may be made by the receiver or, with the leave of the Court, by any creditor who has proved his debt and who

By whom petitions
for annulment may be
made

satisfies the Court that the receiver has been requested and has refused to make such petition

The Section This section is new and has been added by the amending Act of 1926 (XXXIX of 1926) to set at rest the controversy as to whether a creditor has *locus standi* to move the Court for annulment of a transfer by the insolvent, vide notes at pp 328 and 355. The necessity for this amendment has been thus explained in the statement of Objects and Reasons for Bill No 41 of 1926, published in the Gazette of India Pt V, p 137 (dated the 21st August 1926)—“The clause carries out a suggestion made by the Rangoon High Court for the amendment of sections 53 and 51 of the Act of 1910. The Hon'ble Judges point out that the Receiver may be unwilling to exercise his powers under these sections and that

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itself to move as provided
ly follows the decisions of
makes the law clear on the
point.” The section seems to contemplate only the case in which a receiver has been appointed. It does not say what will happen when no Receiver is appointed. Obviously, where no Receiver is appointed, the Insolvency Court can be moved on the petition of a creditor, *Gopal Rao v Hiratal* AIR 1925 Nag 225 83 IC 246, relying on *Bansilal v Ranglal*, AIR 1923 Nag 97 71 IC 418. If no Receiver is appointed the Insolvency Court can itself move under this section on the matter being brought to its notice by a creditor *Seth Sheolal v Girdharilal* AIR 1924 Nag 361 78 IC 140. A creditor can petition for annulment only with the leave of the Court and not as a matter of right. His power in this direction is also subject to two other conditions viz (1) he must have proved his debt and (2) he must satisfy the Court that he has already unsuccessfully approached the Receiver. Or, in other words tender of proof and an abortive appeal to the Receiver in the first instance are conditions precedent to the maintainability of an application under this section. Cf *Ponnusami v Subramania* 20 LW 404 AIR, 1925 Mad 1246. Ordinarily where the interests of all creditors are involved the individual creditor cannot move the Court unless and until the Receiver refuses to move in the matter *Ananthanarayana v Rama Subba*, 47 Mad, 673 (682) 18 LW 857 AIR 1924 Mad 345 79 IC 395, *Henraj v Ram Krishen* (1917) Pat 301 2 PLJ 101 38 IC 369 *Choudappa v Katha pertumal* 49 Mad, 794 50 MLJ 602 AIR 1926 Mad 801 96 IC 914 *Nikka Mal v Marwar Bank* 52 IC 188. This is the principle that should be followed when all the creditors' interests are homogenous and it is possible for the Receiver to represent them all. But where an individual

creditor's interest, are opposed to, or conflicting with, those of the rest of the creditors, so that the Receiver cannot represent the individual creditor's individual claims, a motion may be made by the individual creditor and an appeal may be preferred by him also—per Wallace J in *Choudappa v Kathaperumal*, *supra*. This Madras decision, in so far as it holds that the creditor without any community of interest, even if not *co-nominee* a party to an application for annulment can intervene without first moving the Receiver, must now be taken as abrogated by the new section which prescribes two pre requisites for his application:—(1) proof of debt and (2) an unsuccessful appeal to the Receiver in the first instance. *Idem* also the notes under the heading "Procedure" at pp 335, 36, and under the heading "Who is to make the application" at p 328, *ante*. See also *Bansilal v Ranglal*, 6 N L J 47, 19 N L R 32, A I R 1923 Nag 97, *Basant Bai v Nanhe Mal*, L R 6 A 397, A I R 1926 All 29, 89 I C 357, *Gopalrao v Hiralal* A I R 1925 Nag 225, 83 I C 246, *Khusali Ram v Bholarmal*, 37 All, 252, 28 I C 57. It may incidentally be pointed out here that a transfer of his property effected by an insolvent is not necessarily void as against all persons. Where neither the Receiver nor the Insolvency Court challenges a transfer, a prior gratuitous transferee from the insolvent will have no *locus standi* to challenge it. *Ram Charan Lall v Basdeo Sahai*, 102 I C 92.

Procedure when Receiver is requested to move:

When the Receiver is asked to challenge an alienation, it will be his duty to give a formal notice to the creditor making the requisition calling upon him to substantiate his allegation. A general notice asking creditors to prove their claims will not suffice. A date should be fixed for inquiring into the *bona fides* of the transaction impugned and notice of the same given to the creditors to come and object. There must be an examination of the insolvent and the creditors if any, and if the Receiver finds the alienation to be fraudulent he must move the Court to set it aside. Where the Receiver is not much impressed with its fraudulent character but a creditor wants him to take the matter to Court he can proceed to comply with the request upon taking an indemnity for costs from the importunate creditor. *Ananthanarayana v Ramasubba* 47 Mad, 673, *supra*. The costs of unsuccessful motions by

Receivers' liability for costs and damages

the receiver fall generally on the parties at whose instance the receiver acts and are not ordinarily directed as against the assets in his hands. See *Re Suresh*

Ch Gojee 23 C W N 431. When the Receiver seizes properties other than the insolvent's at the instances of the creditor, he is not himself liable to the true owner for damages,

the true owner may recover damages from the creditor goading on the receiver to action, see *Binda Prasad v Ram Chander*, 19 A L J 277 (Brick Kiln case), following *Abdul Rahim v Sital Prasad*, 41 All 658

Duty of Court The Insolvency Court is not only competent to entertain an application under this section but is bound to enquire judicially into the matter when it is brought to its notice, *Nikka Mal v Marwari Bank Ltd*, 151 P R 1912 52 IC 188 As to the Court's power to move *suo motu* in the matter, see *Seth Sheolal v Girdharilal*, A I R 1924 Nag 361 78 IC 140 *Vide* under sec 53 under the heading "Jurisdiction of Court" at p 315, *ante* Evidently, the creditor who applies for leave under this section has to make out, besides the two essential pre-requisites as to proving his debt and making an unsuccessful request to the receiver, a *prima facie* case for annulment The matter of granting leave is certainly discretionary with the Court, but discretion always means judicial discretion As leave should ordinarily be granted where a *prima facie* case is made out, it will not be proper for a Court to demand security from a creditor as a condition precedent for granting leave If leave is wrongly refused by a subordinate Court, remedy lies under sec 75 (1), and if by a District Court, the remedy lies under sec 75 (3)

55. [§ 38] Subject to the foregoing provisions of this Act with respect to the effect of insolvency on an execution, and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency—

Protection of *bona fide*
transactions

- (a) any payment by the insolvent to any of his creditors,
- (b) any payment or delivery to the insolvent,
- (c) any transfer by the insolvent for valuable consideration, or
- (d) any contract or dealing by or with the insolvent for valuable consideration.

Provided that any such transaction takes place before the date of the order of adjudication, and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor.

This is old sec 38 and corresponds to sec 45 of the Bankruptcy Act, 1914

Principle and Object of the Section We have seen how insolvency affects the antecedent transactions of the insolvent. But this section gives protection to the transactions mentioned in the clauses (a) (b) (c) and (d) subject to the *proviso* appended to the section and *subject to the foregoing provisions of the Act*, for instance those in sections 51, 52 53 54 and 54A. It protects all transactions unless of course they are in themselves *acts of insolvency* or fraudulent preferences entered into with the insolvent by third persons for valuable consideration and *bona fide* in the sense that the transactions took place without notice of the insolvency petition. *Bhagwan Das v Chaitan Lal* 43 All 477 19 A L J 240 62 I C 337. Cf *Herbert v Higgins* 95 L J Ch 303 *Re Bedham* 69 L T 356. It is meant to protect debtors who have paid their debts to their creditors without knowledge of the latter's insolvency and its benefit must be given to persons who pay their debts after filing of insolvency petition but before adjudication. *Onlarsa v Bridichand* 6 N L J 213 19 N L R 144 A I R 1923 Nag 290 73 I C 103. It should be observed that obviously the doctrine of *relation back* as enunciated in sec 28 (7) has no application in the section but see *Janaki Ram v Official Receiver Coimbatore* 78 I C 16.

Change in Law Under the repealed Act any of the transactions referred to in the aforesaid clauses could be protected if it took place before the date of the order of adjudication but under this section a new clause has been added (1) — and that the person debtor. The effect of this alteration is that in order to avail oneself of the benefit conferred by this section it is not enough to show that the transaction in question took place before the order of adjudication; it must also be shown that the transaction was gone into by the party claiming the benefit without the knowledge of the presentation of the insolvency petition.

Foregoing provisons The whole section is *subject to the provisions of this Act* regarding (1) the effect of insolvency on execution (2) the avoidance of certain transfers and preferences. As to the effect of insolvency on execution see sections 51 and 52 and as to the avoidance of certain transfers see sec 53 and for that of preferences see sec 54. The effect of subordination to the foregoing provisions is that this section cannot give protection to a transfer which is in violation of the fundamental principles of Bankruptcy law. *Sleerath v Munshi Rani* 42 All 433 18 A L J 449 55 I C 941.

The transactions contemplated by this sections are—

(a) Payment by the insolvent to a creditor

- (b) Payment or delivery to the insolvent by any body
Cf *Re Rogers, Ex parte Holland*, (1891) 8 Morr.
243
- (c) A transfer by the insolvent for consideration
- (d) A transaction (contract or dealing) by or with the insolvent for consideration

A transfer of his property by the insolvent to his wife on account of her claim for dower under the Mahomedan Law is entitled to protection under cl (c) of this section, *Nasimunnissa v Abdul Kadir*, 20 O.C. 295 43 I.C. 280. A transfer by a debtor of his properties to a few of his creditors for distribution among all his creditors *pro rata* is a transfer for valuable consideration within the meaning of clause (c) above. Where an assignment is made in pursuance of a previous agreement, there is no fraudulent preference or fraudulent conveyance, and the same may be protected under this section. See *Re Davies* (1921) 3 K.B. 628, distinguishing, *Re Holland* (1920) 2 Ch. 360. The undertaking by the trustees to distribute the assets is sufficient consideration for the transfer, which will therefore be entitled to protection, *Official Receiver of Trichinopoly v Somasundaram*, 30 M.L.J. 415 43 I.C. 602. As to what may or may not be dealing within the meaning of clause (d), see *Ex Parte, Pitters*, 17 Ch.D. 653, *Jitmand v Ramchand*, 29 Bom. 405.

Good faith essential It should be noted that the words '*bona fide*' do not occur in the section except in the marginal note. These words occurred in all the earlier English statutes, [Cf *Butcher v Stead*, (1875) L.R. 7 H.L. 839] though not appearing in sec. 49 of the Bankruptcy Act of 1883 or its substitute sec. 45 of the Act of 1914 and it has been held in England that the omission of these words from the present Act did not make any difference, *Re Slobodinsky, Ex parte Moor*, (1903) 2 K.B. 517, the same view should be taken in respect of the omission of these words from the present section, comp. *Mercantile Bank v Mad Official Assignee* 39 Mad. 250 35 I.C. 942. The short notes on the case reported in 45 Mad. 238 in 41 M.L.J. 13 (Jour.) seem not to be accurate. The section protects only *bona fide* transactions and not *collusive ones*, (1896) 1 Q.B. 406, distinguished in *Re Jukes*, (1902) 2 K.B. 58. Cf *Nilmoni Choudhury v Durga Charan* 22 C.W.N. 704.

Voluntary payment This section does not protect a voluntary payment by the bankrupt, (1901) 85 L.T. 304. "Voluntary payment" is one made spontaneously by a person of his own accord and not (i) under pressure of demand by creditors or, (ii) a possible danger of prosecution. A payment made in the ordinary course of business is not voluntary.

Ramsay & Co v Official Assignee, 35 Mad, 712 10 M L T 124 21 M L J 920 11 IC 769

Notice The transacting party who wants to avail himself of the benefit of this section must not be *tainted* with the notice of the insolvency petition at the time of the transaction. Notice perhaps includes all the different kinds of notice, namely, (i) actual notice, (ii) constructive notice and (iii) imputed notice—See sec 3 of the Transfer of Property Act. Thus, it has been held that a person who takes a transfer of the debtor's property cannot claim the benefit afforded by this section, if he had notice of any circumstances that should have put him on enquiry, *Ex parte Moore* (1923) 2 K B 517, see also *Re Dicken*, 46 L T 238, *Ex parte Rich Dale*, 19 Ch D 409. Also see p 117 Cf *Onkarsa v Bridichand*, *supra*

Proviso: Before the date of the order of adjudication The order of adjudication relates back to and takes effect from the date of the presentation of the Insolvency petition, see sec 28 (7), also *Rakhal v Shudhindra* 4 C W N 172. This does not mean that the order can be *ante dated* so it seems that for the purpose of the proviso the word *date* means the actual date. Besides the effect of the proviso being to curtail the rights of a transferee it should receive a strict and literal construction. Cf *Achambit Lal v Chhanga Mal* 32 IC 429. "The order of adjudication relates back and takes effect under sec 28 (-) for the purpose of binding the insolvent and his creditors from the date of the presentation of the petition of insolvency. But it takes effect retrospectively only to the extent laid down in the Act. If the date of the order of adjudication referred to in sec 55 (old sec 38), be deemed to mean the date of presentation of the petition of insolvency, secs 34 & 38 (now secs 51 & 55) would become redundant and out of place." *Ibid*

It should be noticed that no protection is given by this section to a transaction *after* the adjudication which operating to vest the property in the Receiver under sec 28 (2), precludes all such transactions. Cf *Re Jivandas Jhavar* 40 Cal, 78 18 IC 908, *Raghunath Das v Sundar Das*, 47 Cal 77 20 C L J 555 (P C), *Ram Bahadur v Nipunji* 25 Bom L R 497 A I R 1924 Bom 49 73 IC 379

Onus of proof Where a person claims protection under this section, the onus is on him to prove facts which will entitle him to protection, *e g*, that the transaction was for value and *bona fide* that is without notice of the bankruptcy, *Re Seaman* (1896) 1 Q B 417. *Ex parte Revell*, (1885) 13 Q B D 720 (728), *Ex parte Cartwright*, (1881) 44 L T 883, *Ex parte Schulte*, (1874) 9 Ch App 409

Realisation of Property

56. [§ 18] (1) The Court may, at the time of the order of adjudication or at any time afterwards, appoint a receiver for the property of the insolvent, and such property shall thereupon vest in such receiver

(2) Subject to such conditions as may be prescribed, the Court may—

(a) require the receiver to give such security as it thinks fit duly to account for what he shall receive in respect of the property, and

(b) by general or special order, fix the amount to be paid as remuneration for the services of the receiver out of the assets of the insolvent

(3) Where the Court appoints a receiver, it may remove the person in whose possession or custody any such property as aforesaid is from the possession or custody thereof

Provided that nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove

(4) Where a receiver appointed under this section—

(a) fails to submit his accounts at such periods and in such form as the Court directs or

(b) fails to pay the balance due from him thereon as the Court directs, or

(c) occasions loss to the property by his wilful default or gross negligence

the Court may direct his property to be attached and sold and may apply the proceeds to make good any balance found to be due from him or any loss so occasioned by him

[New] (5) *The provisions of this section shall apply so far as may be to interim receivers appointed under section 20*

The Section This is section 18 of the Act of 1907. Its object is to empower the Court to take charge of the insolvent's property upon adjudication for the purpose of securing fair distribution of the insolvent's assets among his creditors and as the Court cannot possibly act itself provision is herein made for the appointment of a Receiver. A Receiver is therefore the hands of a Court see *Manik Lal v Saral* 22 Cal 648, *Hansessur v Rahhal Das* 18 CWN 366 *Louis Dreyfus & Co v Jan Mohamed* 49 IC 421. In every system of law the term may vary but in all there is an official be he called an assignee or trustee or by any other name and that official is by force of the statute invested in the bankrupt's property. But the property he takes is the property of the bankrupt exactly as it stood in his person with all its advantages and all its burdens. This is one of fundamental principles of all arrangements for the realisation and distribution of the bankrupt's property *Shcobaran Singh v Kulsum un nissa* 49 All 367 31 CWN 853 (857) PC. It should be noted that an interim receiver is appointed under sec 20 for the protection or preservation of the insolvent's estate and a receiver, is appointed under this section for the realisation of the same. Cf *Madhu Sardar v Kshitish Chandra* 47 Cal 289 30 IC 87, *Ison Lord & Co v Virbhandas* AIR 1924 Sind 69 76 IC 380.

The language of this section is comprehensive enough to confer jurisdiction upon the Insolvency Court to direct that possession of insolvent's property be given to the Receiver *Kochu Mahomed v Sankaralinga* 44 Mad 524 40 MLJ 219 62 IC 495. In realising the assets of the insolvent the Court should follow the procedure laid down in this Act and should not follow his own whims. So where a Court without making an order of adjudication or appointing a Receiver directed the debtor of the insolvent to pay into Court the money owing from him to the insolvent the procedure was held not to be in accordance with this Act *Ganpat v Anurita* 44 IC 537. The Court can always direct an administration inquiry by the Receiver for the purpose of getting information and deciding what action should be taken *Joy Chandra v Mahomed Amir*, 22 CWN 702.

Sub-section (1) Receiver appointment and removal

Receiver may be appointed at any time afterwards

The Receiver may be appointed at the time of the order of adjudication or at any subsequent time. A mere lapse of seven years after the order of adjudication is no ground for refusing to appoint

a Receiver to the insolvent's property. *Horo Mohun v Mohan Das* 39 C L J 459 A I R 1924 Cal 849 83 I C 360. We have seen that upon adjudication the insolvent's property vests in the Court when there is no Receiver see sec 28 (2). So it follows that if a receiver is appointed at a time subsequent to the order of adjudication the property first vests in the Court, and when a Receiver is appointed it then vests in the latter as an officer of the former also see sec 28 (2) and sec 58. It seems that a Receiver cannot be appointed in respect of a part only of the insolvent's property. *N N S Chetty v Bailiff of District Court* 4 Bur L J 56 A I R 1925 Rang 224 89 I C 61. No set form of words is necessary for the appointment of a receiver see *Sankaranarayanan Pillai v Rajamani*, 47 Mad 462 (4-4).

The section does not say who is to be appointed a Receiver. One of the creditors may be appointed a receiver. *Jhabba Lal v Shib Charan* 39 All 159. But see *Chandi Parshad v Jaggu Kunhi* L R 3 A 55 where it is held that the Court has no power to appoint a creditor of the insolvent as a kind of Receiver to realise the insolvent's property and pay the money into Court. As to whether a stranger or a party to a proceeding is a fit person to be appointed see *Allen v Lloyd* 12 Ch D 441. *In re Martin* 1 Q B D 34. For an instance of a Deputy Bailiff being appointed a receiver see *N N S Chetty Firm v Bailiff of District Court* 4 Bur L J 56 A I R 1925 Rang 224 89 I C 61. As the discharge of a receiver's duty involves a fair knowledge of the law it is desirable that a gentleman of legal training should be appointed. Cf *Kunja Behari v Madhu Sodan* 50 I C 117 (All). Also see the provisions of O X, rr 14 of the Code of Civil Procedure 1908 which may be applicable when not contrary to or inconsistent with the provisions of this Act because sec 5 of the Insolvency Act has recommended the adoption of the procedure of the C P Code subject to the provisions hereof see also *Jagat Tarini v Naba Gopal*, 34 Cal 205 5 C L J 270. A person related with the insolvent should not be appointed a receiver, as it is not expected of him to act impartially. *Le Laitib* (1891) 2 Q B 805. The object of the appointment is to have the insolvent's assets realised through the receiver and not to provide for the determination of disputes as to title between the insolvent and third parties. *Maddipati v Gandappa* 47 I C 35 21 M L T 106 (1918) M W N 479. Read also the extract quoted from

Sleoharan Singh's case at p 367, ante The Court cannot delegate judicial functions to the Receiver, *vide* at p 336, ante Cf also *Hamida Rahaman v Jamila Khatun*, 34 C L J 123 The Receiver too cannot entrust or delegate his duties, to another, *Balaji v Ramchandra*, 19 Bom 660 The power of appointment carries with it the power of removal, therefore both appointment and removal of Receivers are in the control of the Court, *Official Receiver, Tanjore v Nataraja Sastrigal*, 46 Mad, 405 44 M L J 251 (1923) M W N 212 A I R (1923) Mad 355 72 I C 225 There is nothing in this section or in R 12 of the Rules framed by the Madras High Court to prevent the Court from removing the Official Receiver and appointing a *special* Receiver in his place, *Ibid*, but good reasons should be shown for the purpose, *Ibid*.

The Receiver is not however a Court, but is a mere officer of the Court through whom the Court

His status

retains custody or control of the insolvent's property, *Basodi v Mahanand*, 42 I C 799 s c 13 N L R 210, see Halsbury's *Laws of England*, Vol II, Art, 88, p 56 *Beardsell & Co v Abdul Gunni*, 37 Mad 107, s c 11 M L T 391 14 I C 593 (1912) M W N 536 As an officer of the Court, it forms no part of the receiver's (or the Official Assignee's) duty to prefer frivolous claims unsupported by reliable evidence or to transfer them to others and thus promote unnecessary and useless litigation, *Chockalingam v Seethai Achi*, 55 I A 7 6 Rang 29 (1928) M W N 20 32 C W N 281 47 C L J 136 30 Bom L R 220 26 A L J 371 54 M L J 88 A I R 1928 P C 252 107 I C 237 Whenever necessary, the Court can direct the Receiver to inquire into specific matters and report to him for his own information, *Satya Kumar v Manager, Benares Bank Ltd*, 22 C W N 700, cf *Tulsi Ram v Mahomed Araf*, A I R 1928 Lah 738 109 I C 373 For certain purposes the Receiver's report may be used as evidence, see sec 42 (2) Cf also sec 38 (4), *Chinna Meera v Kumarachakravarthy*, 36 I C 906 But such report is no evidence to support a conviction under this Act, see *Nanda Kishore v Suraj Mal* 37 All 429, s c 13 A L J 642 29 I C 998, see also *Harihar v Moheshur* 18 C W N 692 27 I C 199 Though the Receiver takes the estate for the benefit of the creditors, still he is not their representative, and there is no privity between the latter and him Therefore, the creditors are not bound by the decision in a suit though the Receiver was a party thereto, *Louis Dreyfus & Co v Jan Mahomed* 49 I C 421 The effect of representation of the insolvent's estate by the Receiver is that so long as the Receiver is there no individual creditor out of the general body of creditors can participate in the litigations concerning it

Difference between Receiver in insolvency and an ordinary Receiver in action

insolvent estate, if any individual creditor has any complaint he must in the first instance look to the Receiver for redress, it is only when the Receiver has declined to move in the matter that the creditor has *locus standi* to proceed himself, *Jhabba Lal v Shib Charan*, 39 All, 152 15 A L J 1 37 I C 76 The position of a receiver in bankruptcy is different from that of a receiver appointed in an ordinary civil suit, *Amrita Lal v Narain*, 30 C L J 515 Cf *Sant Prosad v Sheodut*, 2 Pat, 724 A I R 1924 Pat 259 77 I C 589,

Is permission necessary to sue a Receiver?

Maharana Kunwar v David, 21 A L J 373 A I R 1924 All 40 Sulaiman J has thus given his reasons in *Maharana Kunwar v David* "A Receiver ap-

pointed under the C P Code merely holds the estate on behalf of the Court. The estate does not vest in him, nor does he in any way represent it. Leave of the Court is necessary in order that by impleading him the estate may be bound, without leave

he represents no body, after leave he represents the real beneficiary. A Receiver under this Act holds a different capacity altogether. He is more than a mere officer of the Court, the insolvent's estate vests in him. He alone, and no one else represents the estate. He therefore is the proper party to be impleaded in the action. No leave is accordingly necessary for suing him," *vide* also under Sec 59. A Receiver is a public officer within the meaning of sec 2 (17) of the C P Code, therefore he cannot be sued without a previous notice under sec 80 of that Code, *De Silva v Govind Balaram*, 44 Bom, 895 22 Bom, L R. 987 58 I C 411, also *Murari Lal v David*, 47 All 291 A I R 1925 All 241 22 A L J 1116 84 I C 739 (All) but see *Shippers & Co v David*, cited at p 391, *infra*. Cf in this connection the following cases, *Bhagchand Dagdusa v Secretary of State*, 32 C W N 61, P C, *Radharani v Purna Sarcar* 34 C W N 671. A sanction granted by the Insolvency Court to file a suit is not tantamount to a notice to the Receiver within the meaning of sec 80, C P Code, *Murari Lal's case*, *supra*. Cf *Purna v Radharani*, S A 2316/28 decided on 23-7-30.

Vest —Under this Act, as soon as a receiver is appointed the insolvent's property vests in him by operation of law, and no vesting order is necessary. Cf *Re Calcott* (1895) 2 Ch 460. The Madras High Court has however held that in the case of an Official Receiver, who becomes the Receiver in the case by virtue of sec 57 (2), the Court should formally pass an order appointing a Receiver under this section and should not treat the properties as automatically vesting in the Official Receiver as soon as the order of adjudication is made, *Official Receiver of Trichinopoly v Somasundaram*, 30 M L J 415 34 I C 602.

Basa a Sankaran v Anjaneyulu 50 Mad 135 (F B), *Sankaranarayanan v Rajamani* 47 Mad 462 46 M L J 314 A I R 10 4 Mad 550 S, I C 196 *Ramasami v Muthusami*, 48 I C 56 41 Mad 93, *Ilithinga Padayachi v Ponnusami*, 41 M L J 8 19.1 M W N 243 62 I C 396 Or in other words, an express vesting order is necessary for the *Official Receiver*, and without it he cannot deal with the insolvent's estate, *Kaali Sankar v Turlapati* 46 M L J 184 (1924) M W N 198 19 L W 450 A I R 1924 Mad 461 78 I C 294, and a sale of the estate by the *Official Receiver* without such an order does not give the vendee any title, *Muthusami Swamiar v Somoo Handiar*, 43 Mad, 869 39 M L J 438,—(distinguished in *Subbah Aiyar v T S Ramasami* 44 Mad 547 40 M L J 209 62 I C 346) So, in the absence of a special order of such appointment a purchaser from the *Official Receiver* does not get a valid title to the property purchased, see 39 M L J 22 (notes), Cf *Pinnamameti Basara v Garapati Narasimhulu*, 51 M L J 529 A I R 1927 Mad 1 (F B) Where the *Official Receiver* has sold the insolvent's property before an order vesting it in him is made, the sale can be retrospectively validated by a subsequent vesting order, *Narasimudu v Basa a Sankardu*, 47 M L J 749 20 L W 946 A I R 1925 Mad 249 85 I C 439 The principle of ratification by the Court of the act of its agent or the principle of sec 43 of the Transfer of Property Act will apply in such a case, *Ibid* see *Basa a Sankaran v Anjaneyulu*, 50 Mad, 135 (F B) Cf *Sankaranarayanan v Rajamani* *supra* Cf *Subbah Aiyar v Rama Swamy*, 44 Mad, 547 40 M L J 209 62 I C 346 The Receiver, from the moment the insolvent's estate vests in him represents the general body of creditors and ought to protect their interests If in the exercise of his discretion he thinks it unnecessary to appear in order to do so, but finds that a particular creditor thinks an appearance necessary, the proper practice for him is to obtain an indemnity bond from such creditor and to carry on the contest, recovering his costs from him in case of failure, *Kumarappa v Murugappa* 36 I C 771 (Mad) It is only the insolvent's interest that vests in the Receiver and not his co-sharer's, *Sannyasi v Asutosh*, 42 Cal, 225 *Palaniappa v Official Receiver, Trichinopoly*, 35 I C 610 32 M L J 84 2c M L T 334 4 L W 51 As a mere attachment does not create any interest in the attached property, the effect of vesting of the insolvent's property under this section is in fact to cancel an attachment thereon See *Dambar Singh v Munwar Ali*, 40 All, 86 15 A L J 877 43 I C 129.

Vesting relates back It is needless to mention that by reason of sec 28(7), the vesting of the property in the receiver shifts back to the time of the presentation of the

insolvency petition, see *Tulsi Ram's* case and *Sheonath's* case, cited at p 202, *ante*

If the Receiver abandons any part of the insolvent's estate as worthless or unrealisable it will revert to the insolvent, who will then, upon discharge, be entitled to alienate it, *Sheonandan v Kashi* 39 All, 223 15 A L J 79, 37 I C, 8,8

Sub-section (2): Subject to conditions. See the Rules "Prescribed" means prescribed by rules made under sec 79, see sec 2 (1) (c)

Security The Court can ask for security from the Receiver and if the order of appointment is made subject to the latter's furnishing security, the appointment is not complete, so far as it affects third parties at any rate, until the security is given, *Edwards v Edwards* (1876), 7 Ch D 291 But when the Receiver furnishes security the order of appointment relates back to the time of its pronouncement, *In re Watkins* (1879) 13 Ch D 252 Where there is no direction as to security, the order of appointment takes effect from the moment it is made *Morrison v Sherne* 1889, 60 L T 588

Receiver's remuneration should be fixed by the Court, *Prokash v Adlam* 30 Cal, 696 (698) This follows logically from the fact that he is a servant of the Court, *Manick v Surrut Coomari* 22 Cal, 648 So a Receiver cannot receive any remuneration from any one else, similarly, a promise to pay the salary of a Receiver without the sanction of the Court will not bind the promisor, *Prokash v Adlam*, 30 Cal, 696 Any secret understanding for remuneration between the receiver and any party amounts to a gross fraud on the Court and renders the parties to the agreement liable for contempt of Court, *Manick v Surrut Coomari* 22 Cal 648 (656) As to the amount of the remuneration the Court has a discretion in the matter Cf *Re Wayman* (1889) 24 Q B D 68 The remuneration is generally calculated by the method of percentage or commission, but the Court has jurisdiction in its discretion to fix a monthly payment in lieu thereof It must be paid out of the insolvent's estate, and the legal representatives cannot be made personally liable, *Sripal Singh v Ram Sarup* 76 I C 583 A Receiver has a lien for his percentage or remuneration on the net assets remaining after payment of all charges *Mahadev v Kuppu suami* 15 Mad 233 Once the Receiver has collected the assets he is entitled to his percentage or commission thereon, and this right is not defeated by subsequent annulment of the adjudication order Cf *Official Assignee v Ramlinga* 8 Mad, 79 Under r 16 of Ch XVIII of the Manual of Circulars issued by the Bombay High Court, the remuneration of a Receiver (other than an Official Receiver) should not be fixed at a rate exceeding 5 p c of the amount of dividends, *Jorapur*

v Venkates Bahant Joshi, 27 Bom L.R. 1116 A.I.R. 1925 Bom 472 90 I.C. 656 The Court will not be justified in directing payment at the rate of 5 p.c. on the whole amount realised, *Ibid*. In the case of a mortgaged property, the Receiver will get his commission on the value of the equity of redemption and not on the sale proceeds of the entire property as it is only the equity of redemption that vest in him, *Sridhar v Atmaram*, 7 Bom., 455, *Sridhar v Krishnaji*, 12 Bom., 272, *Sheoraj v Gouri Sahaj*, 21 All., 227, *Re Official Assignee's Commission*, 36 Cal., 990—relied on in *Chettyar Firm v Hla Bu*, 5 Rang 623 A.I.R. 1928 Rang 23 106 I.C. 200, 15 Mad 233, *Jorapur v Venkates Bahant supra*. The Receiver gets a percentage only on the balance remaining after the payment of the mortgage amount, *Gowinda v Abdul Kadir* A.I.R. 1923 Nag 150, *K P S P P L Firm v C A P C Firm*, 7 Rang 126 A.I.R. 1929 Rang 168 117 I.C. 582 *Comp Official Assignee of Calcutta v Ramratan*, 54 Cal 317 A.I.R. 1927 Cal 529 102 I.C. 539

Sub-sect. (3): Power to remove person in possession :

The provisions of this section are somewhat analogous to those of O. XL r. 1, sub-sections (1) (b) and 2. So in construing the words of this sub-section cases under the said rules of C. P. Code may profitably be referred to. This sub-section empowers the Court, where it appoints a Receiver, to remove any person, in whose possession or custody any property of the insolvent is, from the possession or custody thereof, provided the insolvent has a right to remove him *Banshidhar v Kharagji*, 37 All., 65 12 A.L.J. 1273 26 I.C. 926. The language of the section is comprehensive enough to confer jurisdiction upon the Insolvency Court to direct that possession of insolvent's property be given to the Receiver, *Kochu Mahomed v Sankaralinga, infra*. This clause however does not authorise the removal of a person who claims *adversely* to the insolvent or whom the insolvent himself could not remove without the aid of legal proceedings, *Nilmoni Choudhury v Durgacharan*, 22 C.W.N. 704 46 I.C. 377. This is indicated by the *proviso* to this sub-section, which limits the Court's power to persons whom the insolvent has "a present right to remove". Obviously, therefore, this sub-section cannot confer jurisdiction over a person against whom the insolvent has merely a right enforceable by a suit. *Maddipoti v Gandrapu*, (1918) M.W.N. 479 8 L.W. 136 24 M.L.T. 106 47 I.C. 308. Where the person in possession claims *adversely* to the insolvent or asserts that the insolvent is not entitled to *present* possession or in other words, where there is a dispute as to the insolvent's title, the Court has no power to proceed under this section, *Chittammal v Ponnuswami*, 49 Mad 762 50 M.L.J. 180 (1926) M.W.N. 121 & 172 A.I.R. 1926 Mad 363 92 I.C. 57.

Even when such a person holds the property under a transfer which is voidable under sec 54, the Receiver cannot remove him until the transfer is actually annulled, *N N S Chetty v Bailiff of Dist Court*, 4 Bur L J 56 AIR 1925 Rang 224 89 IC 61 The restriction on the Court's power to disturb possession under this sub section has reference to cases where owing to the act of the insolvent the property is under a lease for a particular period or is under a usufructuary mortgage or the like, *Kochu Mahomed v Sankaralingam*, 44 Mad 524 40 M L J 219 (1921) M W N 236 14 L W 505 62 IC 495 Before ejecting a person under this sub section the Court should act with the judicial caution of a Civil Court, 94 IC 506 (*infra*) and hold a regular trial as it does in an original civil case, *Banshidhar v Kharagut*, 37 All, 65 12 A L J 1273 26 IC 926 Or, in other words, proceedings should be taken under sec 4 of the Act, *Chittammal v Ponnuswami supra* vide also under sec 4, *ante* It is however not the duty of a Receiver to enquire into the title of third parties and the Court cannot delegate an enquiry regarding the matter to him, *Hamida Rahaman v Jamila Khatun*, 34 C L J 123 Before taking action under this section the Court should appoint a regular Receiver as distinguished from an interim Receiver, *Gobardhan Das v Jagat Narain* (1926) Pat 134 AIR 1926 Pat 291 94 IC 506 Where some of the insolvent's properties are sold away, *after adjudication and the appointment of a Receiver* in execution of a money decree it is competent to the Receiver to make an application under this sub section to the Insolvency Court for annulment of the sale and for delivery of possession of the properties from the auction-purchaser *Official Receiver, Finncervelly v Sankaralinga*, 44 Mad, 524, also called *Kochu Mahomed's case (supra)* If the creditors wrongfully induce the Court to make over possession of a property (belonging to a stranger) to the Receiver on the allegation that the property in question really belonged to the debtor, they are legally liable for damages to the real owner, *Brinda Prasad v Ram Chandra* 19 A L J 277—following, *Abdul Rahim v Sital Prasad* 41 All 658 This sub section is not limited to the case of an application by the Receiver, but applies equally to an application by a purchaser from the Receiver for delivery of possession, *Rama Swami v Official Receiver Madura*, 45 Mad 434 42 M L J 185 15 L W 273 (1922) M W N 110 65 IC 394 AIR 1922 Mad 147

Under this sub-section, the Court is competent to order that the property of the insolvent should be placed in the possession of the Receiver and to enquire whether the property is in reality in the possession of the insolvent and whether the Receiver is entitled to obtain possession of it When a sale of the insolvent's property is a mere *benami* or *sham* trans-

action, the Receiver can claim possession of the property without setting aside the sale, *Jagrup v Ramanand*, 39 All, 633, 40 P.C. 573, 15 A.L.J. 738. But it seems that where all the outward formalities of a sale, such as registration, delivery of possession etc. have been complied with, the Receiver cannot get possession of the property without taking proceedings (under secs 53 & 54) for setting aside the sale, *N. N. S. Chetty Firm v Bailiff District Court*, 4 Bur. L.J. 56 A.I.R. 1925 Rangoon, 224 89 I.C. 61. The Insolvency Court can reduce to the possession of the Receiver, a property which has been sold away in execution at the instance of the insolvent's creditor subsequent to his adjudication *Kochu Mahomed v Sankaralinga*, 40 M.L.J. 219 (1921) M.W.N. 236 14 L.W. 505 62 I.C. 495. The restriction of the Court's right to disturb possession under the proviso to this section has reference to cases where owing to the act of the insolvent the property is under a lease or usufructuary mortgage or the like (*Ibid*). To give power to the Receiver to collect rents may amount to removal of the person in possession, A.I.R. 1925 Rang. 224 89 I.C. 61, *supra*.

Order under sub-sec. (3)—not final As the power conferred by sec 4 is subject to the provisions of this section, the decision of a Court incapacitated by the proviso to sub-sec (3), cannot finally determine the rights of the parties, *Chittammal v Ponnusami* 49 Mad 762 50 M.L.J. 180 (1926) M.W.N. 121 A.I.R. 1926 Mad 363 92 I.C. 573. Or, in other words, by reason of the proviso to sub-sec (3) the Insolvency Court, notwithstanding the provisions of sec 4, is powerless against obstruction based on independent title. Therefore, in such a case it would be mere waste of time to adjudicate upon questions of title and it would be expedient to have those questions decided in a regular suit, *Official Receiver, South Arcot v Perumal Pillai* A.I.R. 1924 Mad, 387 79 I.C. 322.

Limitation for obtaining possession There is no limitation for a Receiver obtaining possession of the insolvent's property (vested in him) at any time between the date of making the order of adjudication and the date of its being annulled, *Bala Krishna v Veeraraghava* 45 Mad 70 41 M.L.J. 334 (1921) M.W.N. 775 14 L.W. 334. *Vide* also at p 162.

Appeal An order under sec 56 (3) is not appealable to the High Court as of right, but only by leave (see sec 75) which will be granted only where there is a question of general importance or of principle involved in the case *Abdul Ghani v Sahara*, 28 Punj. L.R. 141. Comp in this connection *Rouland Hudson v Morgan* 13 C.W.N. 654 9 C.L.J. 563.

Sub-sec. (4): Court's Control over Receiver. This sub section contemplates some of the delinquencies that a receiver may possibly be guilty of, and empowers the Court to inflict suitable punishment on a delinquent Receiver. But this sub-section is not exhaustive. Clauses (a), (b) and (c) do not enumerate all the offences that a Receiver may commit, and selling the Receiver's property is not the only punishment that the Court can mete out to him. From this clause it should not be supposed that the Court cannot dismiss the Receiver. The power of appointment carries with it the power of dismissal, *Ram Chandra v Rakhai*, 17 C W N 1045.

As to who is to bring the delinquencies of the Receiver to the notice of the Court, the section does not say anything. A Receiver is an officer of the Court, so, if he acts in excess of his authority it is competent even to a stranger to bring that fact to the notice of the Court which has inherent power to make an appropriate order so that the stranger may not be prejudiced by an unlawful act of the Court's own officer, *Hansessur Ghose v Rakhai Das* 18 C W N 366 18 C L J 359 20 I C 683. Cf *Data Ram v Deokinanda*, 1 Lah 307 58 I C 6. Cf *Ex parte Cochrane* L R 20 Eq 282, *Searle v Choat*, 25 Ch D 773, *Re Rasul Huzi Cassum*, 13 Bom L R 13. The Court has powers of supervision over the Receiver and can direct him to act or not to act in a particular manner. *Anashi v Muthu Karuppan* 34 M L J 319 44 I C 885. The Receiver can apply for instructions to the Court whenever necessary. *Re Tirthadas Nathumal* 6 S L R 486 19 I C 920. But he should literally carry them out, *Trenchard v Same* (1918) 1 Ch D 423. As to the Court's power to interfere with regular or improper sales by the Receiver, see *Rambhadra Chetty v Ramaswami Chetty*, 44 M L J 284 73 I C 375. Ordinarily the Court will not interfere with the act of the Receiver unless it is utterly unreasonable and absurd. *Ex parte Lloyd* (1882) 46 L T 64. Entering into secret agreements with the parties without the knowledge of the Court, is reprehensible. *Manicklal v Sarathkumar* 22 Cal 648.

Receiver if a Court. The Receiver is a mere officer of the Court, *Hansessur v Rakhai*, 18 C W N 366, *Louis Dreyfus & Co v Jan Mahomed*, 49 I C 421, *Manmohan v Hemanta* 23 C L J 553. *Pirthi Nath v Basheshar*, 69 I C 403. There is no provision in the Act to support the view that a Receiver appointed under the Act is himself a Court, *Basodi v Iala Mahanand* 13 N L R 210. Cf *Beardsell & Co v Abdul Gunni* 37 Mad, 107. Consequently it has been held that Art 13 Sch I of the Limitation Act, does not apply to a suit to set aside a Receiver's order, 13 N L R 210. The Receiver is not a judicial officer and has no jurisdiction to make anything in the nature of a judicial inquiry, *Nilmona*

Choudhury v Durga Charan, 22 C W N 704 (706) 46 I C 377 As he is not the Court, sec 5 has no application to the acts done by him, because that section only applies to proceedings in Court, *Guntapalli v Malapati*, 41 Mad, 440 42 I C 525 6 L W 624 (1912) M W N 85-

Contempt of Court. Though the Receiver is not a Court still an interference with his works amounts to a contempt of Court See sec 50 (6) of the Bankruptcy Act, 1883, *Re Mead* L R 20 Eq 282 The Receiver being an officer of the Court the Court will protect its agent against all disturbances *Dinonath v Hogg* 2 Hal 395 Cf *Wilkinson v Gangadhar* 6 B L R 486 All persons holding the insolvent's moneys and securities are bound to make them over to the Receiver and a refusal to do so renders them liable to be punished for contempt of Court Resisting a Receiver in taking possession of the insolvent's property amounts to a contempt of Court *Sasson v Moosaji* 9 I C 485 (Sind) The mere appointment of a Receiver operates as an injunction against all meddlesomeness *Muhammad Zahiruddin v Md Nuruddin* 21 Cal 85 It is competent for the Receiver himself to complain of the contempt and ask for a rule *Grei v Hoogra Mohun* 28 Cal 790 The person guilty of contempt may be punished by being committed to prison or being made to pay the costs and compensation for his improper conduct, Cf *Re William Tayler* 26 C L J 345

Powers of High Courts and Chief Courts

The High Courts in India being superior Courts of Record possess the power of enforcing obedience to their

orders by attachment of property *Hassanbhoj v Cowasji* 7 Bom, 1 *Nairrahoo v Narottamdas* 7 Bom 5 The power to punish for contempt is inherent in the very nature and purpose of Courts of Justice *Re Amritabazar Patila*, 45 Cal, 169 21 C W N 1161 26 C L J 459 (S B) The power of the High Court to imprison for contempt is irrespective of the Indian Codes *Surendranath Banerje v Chief Justice of Bengal* 10 Cal, 109 (P C) Cf *Martin v Laurence* 4 Cal 655 Before the passing of the Contempt of Court Act (VII of 1926) it was held that the High Court had no jurisdiction to punish an offence in relation to a proceeding in the mofussil Courts inasmuch as its power of superintendence did not imply any power of protecting those Courts *Governor of Bengal v Motilal Ghose* 41 Cal 173 17 C W N 1273 18 C L J 452 *Dwijendra Krishna v Surendranath* 17 C W N 575 But that Act has conferred power on the High Courts and Chief Courts to punish contempts of subordinate Courts with simple imprisonment for a term not exceeding six months or with fine not exceeding Rs 2 000 or with both—see sec 3 of the Act This Act does not apply to cases of contempt falling within the

scope of sec 228 of the Indian Penal Code As to the power of the District Court to commit for contempt see *Kochappa v Sachu Devi* 26 Mad, 494 For procedure vide Chapter XXXV of the Criminal Procedure Code

Power of District Courts

Sub-sec (5) Interim Receiver The provisions of this section will apply, so far as practicable to interim Receivers appointed under sec 20 [Cf *Subramania Aiyar v Dharampuram* (1928) M W N 216 A I R 1928 Mad 454] It will be seen that the provisions of section 59 have not been likewise extended to them So an interim receiver cannot be made a party to a legal proceeding under sec 59 (d) See *Re Hunt* 1 B H C R 251 For the difference between interim receiver and a regular receiver, see *Ram Saran v Snaprosad* 58 I C 783 (Pat) and the notes under sec 20 at pp 120 121 ante The fundamental point of difference between the two is that an interim receiver is appointed for the preservation of the estate pending adjudication whereas the other one is appointed for the realisation of the estate after adjudication Cf *Madhu Sardar v Khutish Chandra* 42 Cal 289 *supra* *Lyon Lord & Co v Virbandas* A I R 1924 Sind 69 76 I C 380 *Amrita Lal v Narain Chandra* 30 C L J 515

Regular Receiver vs Interim Receiver

57. [§ 19] (1) The Local Government may appoint such persons as it thinks fit (to be called "Official Receivers") to be Receivers under this Act within such local limits as it may prescribe

Power to appoint Official Receivers

(2) Where any Official Receiver has been so appointed for the local limits of the jurisdiction of any Court having jurisdiction under this Act he shall be the receiver for the purpose of every order appointing a Receiver or an interim receiver issued by any such Court, unless the Court for special reasons otherwise directs

(3) Any sum payable under clause (b) of sub section (2) of section 56 in respect of the services of an Official Receiver shall be credited to such fund as the Local Government may direct

(4) Every Official Receiver shall receive such remuneration out of the said fund or otherwise as the Local Government may fix in this behalf, and no remuneration whatever beyond that so fixed shall be received by the Official Receiver as such

This is section 19 of the Act of 1907 and makes provision for the appointment of an Official Receiver, and such an appointment, especially in the larger towns, is necessitated by the fact that it is not easy always to find out private persons suitable in all respects for the duties of Receivers

Sub-sec. (1) The power of appointing Official Receivers is an optional power (as is clear from the use of the word 'may') which can be exercised by the Local Governments if they find from practical experience of the working of the Act that such appointment is expedient, for instance, in places where the services of suitable persons cannot be easily or conveniently secured, or where in view of the peculiar nature of the cases officers are generally appointed, it is desirable that there should be Official Receivers

Sub-sec. (2): Official Receiver Where Official Receivers are appointed, such Receivers shall ordinarily be the Receivers contemplated by secs 20 and 56 above, and except for special reasons, (such as those connected with the personality of the man) the Court should not appoint other Receivers Cf *Official Receiver v Nataraja Sastrigal*, 46 Mad 405 44 M L J 251 (1923) M W N 212 A I R 1923 Mad 355 72 I C 225 The words "otherwise directs" in this sub section refer not only to the point of time when the Receiver is appointed, but also to the period subsequent to the appointment. That is to say, the Court may not at the initial stage appoint a special Receiver, but may for good reasons at any time whatever, *Ibid Sankaranarajan v Rajamani*, 47 Mad, 462 46 M L J 314 34 M L T 152 A I R 1924 Mad 550 20 L W 357 83 I C 196 As regards the "local limits" of the Court's jurisdiction read the cases under sec 3, at pp 23 24 Note that the Official Receiver shall be the Receiver "for the purpose of every order appointing a Receiver or an interim Receiver issued by the Court" The word 'appointing' shows that even in the case of an Official Receiver there cannot be any automatic appointment or appointment by operation of law There should always be a distinct order for the purpose, *Official Receiver Trichinopoly v Somasundaram* 30 M L J 415 34 I C 602 The property of a person adjudicated an insolvent does not *ipso facto* vest in the Official Receivers who may have been appointed for the local area in which the insolvent is residing, but it is necessary that an order should

have been passed appointing a Receiver before the property would vest in the local Official Receiver, and without such express vesting order the Official Receiver, cannot deal with the insolvent estate, or pass a valid title to a purchaser *13thilinga Padyachi v Ponnuswami* 41 M L J 78 (1921) M W N 243 62 I C 396, *Kavali Sankara v Turlapati* 46 M L J 184 (1924) M W N 198 AIR 1924 Mad 461 8 I C 294 The practice prevailing in the mofussil of treating the Official Receiver as vested with the properties of the insolvent as soon as an adjudication order is made without a preliminary order under sec 56 appointing a receiver is illegal 30 M L J 415 (*supra*) Though an Official Receiver cannot sell the insolvent's property before the necessary vesting order still a transaction by him may be validated by subsequent ratification of it by the Court by an express vesting order or on the principle embodied in sec 43 of the T P Act *Narasimhulu v Basava* 47 M L J 749 AIR 1925 Mad 249 85 I C 439 also *Basava Sankaram v Narasimhulu*, 51 M L J 529 (F B) *Muthiah Chettiar v Doraisami* (1927) M W N 794 27 L W 182 AIR 1927 Mad 1091 106 I C 641 Cf *Muthu Sami Suamiar v Somoo Kandiar* 43 Mad 869 39 M L J 438 (1920) M W N 537 59 I C 507 *Sankara narayana v Rajamani supra vide* also the notes at p 371

The **Special** reasons referred to in this sub section vary with the circumstances of different cases For instance where the Official Assignee has a personal interest in or against the insolvent or his estate the Court should appoint other Receivers For the distinction between a Receiver and an Official Receiver *vide* under sec 80 *post*

His powers Besides possessing all the powers of an ordinary Receiver an Official Receiver possesses the special powers conferred on him by sec 80 *post* and the order made or act done by him under that section, has the effect of an order or act of a Court [See sub sec (2) of sec 80] As to the difference between an ordinary receiver and an Official Receiver *vide* under sec 80 *infra* As to whether a definite vesting order is necessary to vest the insolvent's property in the Official Receiver *vide* notes above An appeal from an order of the Official Receiver however lies to the Court under sec 68 Cf *Beardsell & Co v Abdul Gunni* 37 Mad 107 also 11 M L T 391 Though an Official Receiver is a Court for the purposes of sec 80 still he is not a Court for all purposes see *Re Ash* (1913) 110 L T 48 It should be noticed that after the amendment of 1926 the Official Receiver has been stripped of his former powers *Vide* notes under that section In absence of an order vesting the property in the Official Receiver, if he acts he acts virtually as an agent of the Court acting *qua*

Receiver under this section, *Subba Aiyar v Ramaswami Aiyangar*, 44 Mad, 547 40 M L J 209 13 L W 227 (1921) M W N 135 29 M L T 233 62 I C 346 Cf *Piruthi Nath v Basheshar*, 69 I C 403 As to the privilege of an Official Receiver to sue without mentioning his name under sec 83 of the Presidency Towns Insolvency Act, see *Ramabrishna v Official Receiver*, 32 M L J 520 5 L W 507 40 I C 170 The Official Receiver should conduct the proceedings on behalf of the general body of creditors, *Chinna Meera v Kumara Chakravarthi* 36 I C 906 (Mad) As to whether on resignation of his office by an Official Receiver his successor can carry on the legal proceedings started by him, see *Ramabrishna v Official Receiver*, *supra* As to Court's power to interfere with sales by the Official Receiver, *vide* under the heading "Sale by Receiver when can be interfered with" under sec 68 *infra*, Cf 10 P L R 1914 Subject to what has been said above, an Official Receiver is merely an ordinary litigant who may be entitled to move the Court in the usual manner that is by presentation of a proper application which is to be heard in the presence of the parties and proceedings taken in his absence by the Court must be set aside on the proper application before the Court *Basheshar Nath v Baga Mal* A I R 1929 Lah 805 An Official Assignee should not encourage useless litigation see *Chockalingam v Seethai Achi* 55 I A 7 & cited at p 369, *ante*

Sub-sections (3) & (4) His Remuneration The position of an Official Receiver is somewhat different from that of an ordinary receiver An ordinary receiver is entitled to the remuneration fixed by the Court under sec 56 (2) (b) But in the case of an Official Receiver such remuneration is to be credited to a fund out of which he is to draw his salary fixed by the Local Government, see sub sec (4) The amount of his remuneration that is to be credited to the fund must be calculated just like the remuneration of an ordinary receiver under sec 56 (2) (b) So it has been held that the remuneration of the Official Assignee is not to be assessed on the whole amount of the sale proceeds of the mortgaged property of the insolvent but only on the value of the equity of redemption that comes to his hand *Re Official Assignee's Commission* 36 Cal 990, *vide* notes at pp 372 73

Removal The Court can for sufficient reasons remove an Official Receiver, *Official Receiver Tanjore v Nataraja Sastrigal* 46 Mad 405 44 M L J 251 72 I C 225 See also at pp 368 & 376 *ante* There is nothing in Rule 12 of the Madras High Court to negative such power *Ibid* It seems that if the Receiver's conduct be not altogether free from blame or if he be guilty of bad faith and gross dereliction of duty in effecting his sales etc the Court will be justified

in removing him Cf *Rambadia Chetty v Ramaswami*, 41 M L J 284, *Thiruvencatachariar v Thangia Ammal*, 39 Mad 479, Cf *Ex parte Lloyd*, (1882) 46 L T 64, *Ramchandra v Rakhal*, 17 C W N 1045, cited at p 376

58. [§ 23] Where no receiver is appointed, the Court shall have all the rights of, and may exercise all the powers conferred on, a receiver under this Act

Powers of Court if
no Receiver appointed

The Section This is section 23 of the Act of 1907 It provides that where no Receiver is appointed, the Court shall have all the rights of a Receiver, see *Gobinda Das v Karan Singh*, 40 All 197 16 A L J 32 43 I C 672, *Gobinda v Gopala*, 9 N L R 182 We have seen that sec 28 (2) provides for the vesting of the insolvent's property in the Court, see *Kalachand Banerjee's case*, *infra* In cases of summary administration, the property of the debtor vests in the Court as a receiver, on the mere admission of the insolvency petition, see sec 74 (u) Note that the Court can exercise all

Vesting in Court

the powers which have been conferred on the Receiver under this Act The words 'under this Act' must neces-

sarily exclude the powers conferred by any other Act It will be seen from sec 59 below that an insolvency Receiver possesses wider powers than those conferred by Order XL, of the C P Code, 1908 This Act nowhere empowers the Court or the Receiver to determine judicially the amount of a debt due to the insolvent from a third party, *Govinda v Gopal*, 9 N L R 182, *supra* Where a Court acts under this section, it exercises the functions of a Court and does not act in the character of Receiver *Manakchand v Ibrahim*, 17 N L R 40 62 I C 307 Retention of this judicial character makes it possible for the Court to utilise the provisions of O XXI of the C P Code in effecting sales of the insolvent estate, which an ordinary receiver could not do Thus, a Court can, on default of the auction purchaser to put in the balance of purchase money, hold a re sale and recover the amount of deficiency from the defaulting auction purchaser under O XXI, r 71, C P Code, *Ibid*

Where no Receiver is appointed the property of the insolvent will vest in the Insolvency Court, [see sec 28 (2), also 47 M L J 749 AIR 1925 Mad 249] and then the Court can exercise any of the functions that a Receiver can exercise under this Act, and can even take possession of the insolvent's property, *Bansidhar v Kharagui*, 37 All 65 at p 68, s c 12 A L J 1273 26 I C 926 So in an Allahabad

case, in which there was no Receiver, the Court itself seized certain goods, alleged to have been belonging to the insolvent, but when an objection was made by a stranger that the goods belonged to him and not to the insolvent, the Court released the property. It was further held in this case that the order of release was made by the Court under this section read with sec 68, and that no appeal lay against the order without leave under sec 75 (3). *Ball v Vandall* 3, IC 73. Where there is no Receiver the Court can itself move for annulment of a transfer at the instance of a creditor *Bansil Agarwala v Rangal Agarwala* 19 NLR 32 AIR 1923 Nag 97 6 NLR 47 71 IC 418, *Seth Shoolal v Girdharilal*, 78 IC 140 (Nag). Where the Judge is the Receiver under this section, he must in case of dispute appoint a creditor as the representative of the general body of creditors *Jhabba Lal v Shib Charan*, 39 All, 152 15 ALJ 1 37 IC 76. When the insolvent estate is vested in the Court by virtue of the provisions of this section it can effect a sale of the estate through an agent appointed by it and such agent's act will be valid especially if it is subsequently ratified by the Court, *Sankaranaryana Pillai v Rajamani* 47 Mad 462 46 MLJ 314 AIR 1924 Mad 550 83 IC 196. If no Receiver is appointed it seems that the name of the Judge can be brought on the record as a party defendant in a mortgage suit *vide* notes under sec 47 at p 287, *ante* also *Kalachand Banerji's* case (PC), cited at p 188 *ante*. In such a case the mortgagee however ought to approach the Court and ask for the appointment of a Receiver. The alternative in secs 16 (2) and (4) as to the vesting in the Court or Receiver is inserted to provide for the case of a Receiver not being appointed at the time of adjudication and to foreclose an argument that vesting is suspended until the actual appointment of a Receiver *Kalachand Banerji's* case *supra* 31 CWN 741 (PC). Also *vide* notes under sec 54A.

May This word shows that it is in the *discretion* of the Court either to take upon itself the administration of the insolvent estate or to entrust it to a Receiver. The Receiver can be appointed at a late stage, and the moment he is appointed the estate vests in him, see sec 28 (2). For belated appointment, see *Horomohun v Mohandas* 39 CLJ 432 AIR 1924 Cal 849 83 IC 360.

59. [§ 20] Subject to the provisions of this Act, the receiver shall, with all convenient speed, realise the property of the debtor and

Duties and powers
of receiver

distribute dividends among the creditors entitled thereto, and for that purpose may—

(a) sell all or any part of the property of the insolvent,

(b) give receipts for any money received by him

and may by leave of the Court, do all or any of the following things namely —

(c) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same,

(d) institute defend or continue any suit or other legal proceeding relating to the property of the insolvent,

(e) employ a pleader or other agent to take any proceedings or do any business which may be sanctioned by the Court,

(f) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time subject to such stipulations as to security and otherwise as the Court thinks fit,

(g) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts

(h) refer any dispute to arbitration and compromise all debts claims and liabilities on such terms as may be agreed upon, and

(i) divide in its existing form amongst the creditors, according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot readily or advantageously be sold

This is section 20 of the Act of 1907, and corresponds to sections 56 and 57 of the Bankruptcy Act 1883, (now secs 55 and 56 of the Bankruptcy Act of 1914) It lays down that *subject to the provisions of this Act*, the Receiver shall *promptly* realise the assets of the Insolvent and shall distribute the same among his creditors, and *for this purpose* he may do the various acts in clauses (a) to (i) but in doing the acts of clauses (c) to (i), he must obtain previous leave of the Court. It should be noticed that the whole section is qualified by the introductory words "for the purpose" of realisation and distribution etc. In dealing with the powers and duties of a receiver, it is of paramount importance to remember that the policy of the Bankruptcy law is to treat all creditors alike and therefore it is not competent on the part of the Receiver to prefer, on any account one creditor to another, and the Court will not aid him to do that which is prohibited to be done by him directly, *In re, Purushotam Doss & Bros* 55 M L J 65- 28 L W 816

Duties and Powers of the Receiver The various duties and powers of a Receiver enumerated in this section are all *executive* and not judicial in their nature. The status of a Receiver is that of an officer of the Court *Pirthi Nath v Basheshar* 60 I C 40. And as such it is his duty strictly to obey the directions of the Court and not to act on his own responsibility and then come to Court to sanction what he has done, *Trenchard v Same* (1918) 1 Ch D 423. He is not a judicial officer and has no power to make anything in the nature of a judicial enquiry, *Nilmoni Choudhury v Durga Charan* 22 C W N 704 47 I C 377 also see *Jog Chandra v Mohamed Amir* 22 C W N 702 *Sant Prasad v Sheo Dut*, 2 Pat 704. The Court cannot delegate to the receiver the power of adjudicating upon the question as to the title to certain promissory notes alleged to be held *benami* for the insolvent *Satya Kumar v Manager Benares Bank* 27 C W N 700 46 I C 335. An Official Receiver however can exercise some of the judicial or quasi judicial functions under section 80. The primary duty of the Receiver is to administer the insolvent's estate for the benefit of the creditors that is to *realise the property* of the insolvent and *distribute dividends* among the creditors entitled thereto *with all convenient speed*, *Desraj v Surajmal* 38 All 3- 13 A L J 1064 31 I C 716. "It is the primary duty of the trustee to administer the bankrupt's affairs in such a way as to realise the maximum possible sum for the unsecured creditors. To this end he must as far as possible get in all the assets of the bankrupt and it is generally his duty to set aside transactions that are not binding upon him. It is also his duty to resist claims upon the bankrupt's estate to which there is any answer"—*Ringwood* 15th Ed p 245. In order to carry out this primary

object he may do one or other of the various acts mentioned in the clauses (a) to (i). The acts mentioned in clauses (a) and (b) can be done by him without the leave of the Court, but the acts mentioned in the remaining clauses can be done only with the leave of the Court. The Receiver must himself do the acts; he cannot entrust or delegate his duties to another. *Balaji v Ramchandra* 19 Bom, 660. These acts are in reality done by him standing in the shoes of the insolvent in the interests of the creditors. *Guntapalli v Malapati*, 41 Mad 440 (1917) M W N 857 6 L W 694 42 IC 525. The insolvent can take possession only of the property of the insolvent partners and not the solvent ones, *Sannyasi v Ashutosh*, 42 Cal, 225. *Palaniappa v Official Receiver Trichinopoly* 32 M L J 84 35 IC 610. This section only enables the Receiver to get control of the insolvent's property and not to decide conflicting claims for title. *Maddipati v Gandrappu* 24 M L J 106 (1918) M W N 476 47 IC 308. A Receiver appointed under this Act is a public officer within the meaning of sec 2 sub-sec (17) of the C P Code, and therefore he is protected under sec 80 of that Code against any plaintiff who files a suit against him with regard to any act done by him as such receiver without giving the requisite notice. *De Silva v Gorind Balvant* 44 Bom, 895 22 Bom L R 987 58 IC 411. A Maffusil Receiver (under this Act) stands on much the same footing as the Official Assignee in the Presidency Towns, see *Amrita Lal v Narain Chandra* 46 IC 395 (Cal). As the whole object of administration of the insolvent's estate by the Receiver is to benefit the creditors it is incumbent upon the Receiver to *preserve* and *realise* the insolvent's assets with all possible prudence, and for that purpose it is not desirable that he should give up any property that is of value. *Desraj v Sagarmal*, 38 All, 37 13 A L J 1064 31 IC 716. Though administration of the insolvent's estate is the primary duty of the Receiver, still his duties should not be confined to it alone. The Receiver has some duties to perform in relation to the insolvent's conduct as well. He should watch and investigate the general conduct of the insolvent and report it to the Court whether there is reason to believe that he has committed any offence under the Act or done any act of bad faith which would justify the Court in refusing or qualifying an order of discharge. *Official Receiver Trichinopoly v Somasundaram*, 30 M L J 415 35 IC 607. After the termination of the insolvency proceedings the receiver becomes a *private* individual and if anybody seeks to make him liable for any pecuniary loss occasioned by him to the estate he must proceed by an ordinary suit and the insolvency Court has no jurisdiction to start an enquiry into the conduct of the Receiver, *Narayandas v Chimmam Lal*, 49 All, 321.

25 A L J 219 A I R 1927 All, 266 102 I C 191 He should have the carriage of all the legal proceedings concerning the insolvent estate both in the trial and the appellate Courts *Narasimham v Hanumatha Rao* A I R 1922 Mad, 459 (19 2) M W N 717 70 I C 572 An acknowledgment by the Receiver of the mortgage debt due from the insolvent, in the course of the performance of the Receiver's duties, is within his authority and is sufficient to save limitation within the meaning of sec 19 of the Limitation Act, *Paramasivan v Aristotle* 38 I C 169 When the Receiver seizes properties other than the insolvent's at the instance of the creditor, he is not himself liable to the true owner for damages, it is the creditor who is liable in such a case *Abdul Rahim v Sital Prasad* 41 All 658 *Binda Prasad v Ram Chandar* 19 A L J 2 A decree obtained against the judgment debtor is not binding against the Receiver in insolvency *Shahamat Ali v Rahim Bux*, L R 3 A 436 Where a complaint is made to Court against the Receiver charging him with refusal to confirm a sale held by him it will be his duty to appear before the Court and place all the relevant materials before it *Ram Chandra v Curraju* A I R 1924 Mad 147 A receiver appointed by the Resident's Court at Aden (not under this Act) has no power to make an order against the debtors of the insolvent If the debtors do not comply with his demand his remedy is to sue for the debt *Moses Menahim v Ahraim Solomon* A I R 1925 Bom 223 84 I C 684

Clause (a) • Sell his property For "property" see sec 2 (1)—(d), p 15 A receiver has full power to sell the property and the effects of an insolvent *Woonwala v McLeod* 30 Bom, 515 8 B L R 470 and it is his duty to effect the sale with all convenient speed A receiver not being a Court (18 C W N 366 49 I C 421) a sale by him is not tantamount to a Court sale and therefore does not attract the advantages or infirmities attending Court sales *Basava Sankaran v Anjaneyulu* 50 Mad 135 (F B)

The Receiver cannot complete a sale by simply granting a certificate but should execute a proper deed of conveyance and conform to the requirements of law regarding stamp registration etc Cf *Golam Hossein v Fatima* 16 C W N 394 51 M L J 529 (544) F B *infra* A sale by the Receiver is really a sale by the owner and may be held either by public auction or by private entreaty *Entazuddi v Ram Krishna* 24 C W N 1072 60 I C 745 He is also subject to all the other provisions of the law of sale *vide* sections 54 55 of the T P Act and *Abdul Hashim v Amar Krishna* 46 Cal 887 53 I C 121 So he is bound like other vendors to give a good title unless he expressly stipulates to sell with such title

which he has, *White v Foljambe*, 11 Ves 342, *M Donad v Harrison*, 12 Ves 277, *Basava Sankaram v Narasimhulu*, 51 M L J 529 (533), F B But this does not mean that if the sale is found to convey no title, the purchaser can sue the insolvent for refund of the purchase money, *Partab Singh v Ganda Singh*, 28 Punj L R 74 A claim for pre-emption can be advanced against the Receiver when he effects a sale under this clause, Cf *Kanhai Lal v Kalka Prosad*, 27 All, 6,0 s c 2 A L J 390 Fraudulent misrepresentation by one of the creditors is no ground for setting aside a sale by the receiver, inasmuch as to such a sale the doctrine of *caveat emptor* applies *Ammasai Goundan v Subramania Chettiar* (1926) M W N 688 AIR 1926 Mad 1080 97 IC 781 The provisions of the C P Code do not apply to a sale by the Receiver, *Husaini v Muhammad Zamir*, 26 O C 319 74 IC 802 Cf *Mool Chand v Murari Lall*, 36 All, 8 11 A L J 979 21 IC 702 A sale by the Receiver is not a transfer by operation of law or in execution of a decree, 50 Mad, 135 (F B), *supra* A sale by the receiver not being equivalent to a sale held by the Court, the provisions of O XXI of the C P Code, do not apply to it *Ram Chand v Mohra Shah*, 11 Lah L J 198 30 Punj L R 320 AIR 1920 Lah 622 119 IC 427 therefore, no application can be made under O XXI, r 90 C P Code to set aside the sale by the receiver, *Azanashi v Muthu Karuppan*, 34 M L J 319 7 L W 406 (1918) M W N 345 44 IC 885 Cf *Guntapalli v Malapati* 41 Mad 440 (1917) M W N 857 42 IC 525 For the same reason the provisions of O XXI r 80, do not apply to a receiver's sale see *Maung Tha v Po Ka* cited at p 43, *ante* Even the receiver himself cannot set aside the sale inasmuch the auction he holds ends in a contract with the purchaser, which he can neither disregard nor go behind, *Ammasai Goundan v Subramania* (1926) M W N 688 AIR 1926 Mad 1080 97 IC 781 A sale by the Receiver is at best an act of his, it is not a proceeding under this Act A Court cannot impose upon him while effecting a sale all the duties enjoined by Order XXI of the C P Code *Cheda Lal v Lachman Pershad* 30 All 267 15 A L J 253 37 IC 830 The Court can however interfere with the Receiver's sale if it be irregular or if there be *mala fides*, *Rambhadra v Ramswami* 44 M L J 284 11 L W 622 73 IC 374 1923 Mad 350 Cf *Mohini v Bai Nath* 40 All, 582 The Court can also call for explanation from him if he refuses to confirm a sale held by him, *Ram Chandra v Gurraju*, AIR 1924 Mad 147 The Receiver cannot however himself purchase the property *Ram Kamal v Bank of Bengal* 5 C W N 91

A sale by the receiver before the actual vesting of the estate in him can retrospectively be validated by reason of

sec 43 of the T P Act, *Muthiah Cheltiar v Doraisami Pillai*, (1927) M W N 794 27 L W 182 A I R 1927 Mad 1091 106 I C 641, vide notes at p 380, ante In selling the insolvent's property, the Receiver need not obtain previous permission of the Court, so a sale by the Receiver cannot be impugned on the ground of want of such leave, *Shew W'a v Sulleman*, 15 I C 368 The acts referred to in clauses (a) and (b) not being subject to the "leave of the Court," the question of selling the insolvent's property has been held to be simply within the discretion of the Receiver, *Arman Sardar v Satkhira Jt Stock Co Ltd*, 18 C L J 564 20 I C 273, and the sanction of the Court is not necessary *Woonualla & Co v MacLeod*, 30 Bom 515 8 Bom L R 470 As to the Court's power of interference with an irregular improper or *malafide* sale of the Receiver, vide at p 376, also 44 M L J 284 Sales by the Receiver under the directions of the Court must be treated as sales by the Court *Minatunnessa v Khalunnessa* 21 Cal 479

Where the Official Assignee admitting the proof of claim of a creditor of the insolvent transfers insolvent's property to him by means of a registered sale deed his only remedy is to have the sale deed set aside by means of a regular suit, although if the matter would have rested on a proof of claim only and if no sale deed had been executed it would have been open to the Official Assignee to come to the Insolvency Court and to have the proof expunged *In re Lakshman s. a. Chetty* A I R 1929 Mad 141 114 I C 840

Mortgage The Court can authorise the receiver to mortgage the insolvent estate, though ordinarily such a course should not be adopted *Lachman Singh v Ram Das*, 92 I C 949

Clause (b): Receipts He may give receipts and can do so without the leave of the Court Though this section empowers the receiver to realise the insolvent's assets and to grant receipts he has no right to determine the amount of debt due to the insolvent from another person *Gobinda v Gopal* 9 N L R 182 22 I C 69 The receipt granted under this clause will have the effect of discharging the person paying from all further responsibility in respect of the money paid

Leave of the Court The acts mentioned in Clauses (c) to (i) must be done with the leave of the Court The Act does not prescribe any particular mode as to how such leave is to be obtained It has however been held that the leave need *not be in writing*, nor be in any specified form, *Re V'a. a Sour* (1900) 2 Q B 309, *Mahomed Galif v Abdul Rahim* A I R 1926 N 156 89 I C 419 But the leave

should not be of a general character, but be with reference to a particular act [Cf *Grey v Lamond Walker*, 17 C W N 578] and should be obtained before the act is done, *Re Vaa Sour*, *supra*, but the omission to obtain leave is not fatal to the suit 89 I C 419 (*supra*), as the obtaining of leave is a matter between the Receiver and the Court, and want of the leave cannot be relied on by a defendant in a suit brought by the Receiver, *Official Receiver v Kanga*, 45 Mad, 167 42 M L J 53 (1921) M W N 858 14 L W 655 69 I C 908—following *Re Branson* (1914) 2 K B 701, *Laduram Nathmull v Nandalal*, 47 Cal, 555 (557) 31 C L J 150 55 I C 747 Or, in other words absence of leave cannot be pleaded as a valid defence to the Receiver's suit, 89 I C 419 (*supra*) Cf *Re Branson*, *Ex parte Trustee*, (1914) 2 K B 701 The provision as to leave is an administrative one, see 47 Cal 555, *supra* or as Shadi Lal J puts it in *Rup Ram v Fazal Din*, 1 Lah 237 (239) 57 I C 223, is a "domestic" matter See also *Firm Lalchand v Firm Tej Bhandas*, A I R 1929 Sind 41 112 I C 452 Therefore failure by an Official Receiver to obtain sanction of the Court to a proposed compromise does not invalidate the compromise which is effected and carried out, *ibid*, comp *Lee v Langster* (1859) 2 C B (N S) 1 5 W R 487, *Leeming v Murray*, (1879) 13 Ch D 123 48 L J Ch 737 An Official Receiver who prosecutes a suit without the leave of the Court cannot in case he loses it charge the costs of suit on the Insolvent's estate, *Official Receiver v Kanga supra*, see also *Re White* (1902) W N 114 If the right of suit has not been conferred by the terms of his appointment he cannot maintain any suit *Drabamooie v Davies* 14 Cal 323 Where the writ of appointment authorises the Receiver to use all such lawful means and remedies for recovering realising rent etc, it will imply that a right of suit has been conferred *Haridas Kundu v J C McGregor* 18 Cal 4-- In all important matters the receiver should apply for and obtain the direction of the Court *Balaji v Ram Chandra* 19 Bom 660 Cf *Re Tirthadas Nathumal* cited at p 376

But as to whether previous sanction of the Court is necessary to proceed against a receiver, it has uniformly been held that such a sanction is a condition precedent to the institution of a proceeding against a receiver appointed in an action see *Aston v Herson* (1834) 2 M & K 390 *Promotha v Kshetra* 32 Cal, 270 In the Punjab case it has been held that though the receiver cannot be sued without the permission of the Court appointing him still such permission is not a condition precedent to the institution of the suit, and that permission subsequently obtained will validate the proceeding against the receiver, *Muhammad Umar v Munshiram* 51 P R

1917 32 P W R 1917 41 I C 802, see also *Banku Behari v Harendra*, 15 C W N 54 8 I C 1, *Maharaja of Burdwan v Apurba Krishna*, 1 C L J, 50 15 C W N 872 10 I C 527, *Sarat v Apurba* 14 C L J, 55 15 C W N 975 11 I C 187 But the position of a Receiver in insolvency is quite unlike that of a Receiver in a suit, he occupies a position similar to that of an assignee in bankruptcy under the English law, and is quite different from that of a receiver appointed in an action therefore no sanction from the judge having the carriage of the proceeding is necessary

If leave of Court necessary for suing a bankrupt receiver for action against him *Amrita Lal v Narain*, 30 C L J 515 53 I C 973, see also *Halima v Mathradas* 40 I C 122 10 S L R 19 *Sant Prosad v*

Sheodat, 2 Pat 24 *Maharana Kunwar v David* 21 A L J 737 L R 4 A 483 A I R 1924 All 40 but according to the Bombay High Court the Receiver is a public officer and a notice under sec 80 of the C P Code is necessary before instituting a suit against him *De Silva v Govind Balwant*, 44 Bom, 895 22 Bom L R 98- 58 I C 411 See also the notes and cases at p 30 ante In *De Silva's* case the Receiver was an Official Receiver According to some view there is a difference between an Official Receiver and an ordinary receiver and the former being an official may be a public officer but not so the latter Cf *Purna Ch Sarcar v Radharani* S A No 2316 of 1928 decided by Subrawardy and Costello JJ on 23 7 30 For contra see *Radharani v Purna* S A No 1481 of 1929 decided on 10 7 29 by Page & Patterson JJ [both these cases will soon be reported in the C L J] The language of sec 2 (17) (d) of the C P Code is so very wide that it is well nigh impossible to maintain that a receiver does not fall within the definition of a 'public officer' See *Radha Rani v Purna Sarkar* 34 C W N 671 therefore sec 80 ought to be applied to a suit against an ordinary receiver as well But it has been maintained that even if this view be correct still unless there is act or omission on the part of the receiver in his official capacity no notice under sec 80 is necessary *Slippers & Co v David* 48 All 871 24 A L J 1067 A I R 192 All 137 99 I C 138 A sanction by the Insolvency Court for institution of a suit against the Receiver cannot be

Notice to Receiver before suit taken as tantamount to a notice under sec 80 *Murari Lal v David* 84 I C 739 (All) Vide also at p 30

under the marginal heading *His Status* Of course where the receiver is not a necessary party no such permission is necessary In a suit to establish title to property which has already been sold by the receiver it is not necessary to join the latter as a party defendant The mere fact that the

receiver's name is on the record as a defendant is not sufficient to defeat the plaintiff's claim on the ground of want of the Court's permission, *Kudan Lal v Shadi Ram*, 55 P R 1917 130 P W R 1917 134 P L R 1917 41 I C 809 Cf *Skippers & Co v David*, 48 All, 821

Clause (c): Carry on business See the notes under Sec 11 at p 96 The receiver may carry on the business of the insolvent but he should do so not with a view to profit but only in so far as may be necessary for the beneficial winding up of the same, *Ex parte Emmanuel*, (1881) 17 Ch D 35 59 See also *Anand Mahanti v Ganesh*, 40 Cal, 678, 683, *Grey v Lamond Walker* 17 C W N 878, and Sec 57 (1) of the Bankruptcy Act, 1883 It is a common principle that the Courts are generally averse to assuming the management of a business unless the purposes of liquidation demand it, *Re Manchester & Milford Ry Co*, (1880) 14 Ch D 645

Jatri or *pilgrim business* that is, what the priest does for the pilgrims cannot be described as "business" within the meaning of this Clause, *Anand Mahanti v Ganesh*, 40 Cal, 678 (683) 21 I C 969

Clause (d): Receiver's power to continue legal proceedings By virtue of this sub-section, the Receiver can sue for partition where an insolvent's undivided share in the joint family property has vested in him, *Lal Bahadur v Paspal prosad* 10 O L J 13 A I R 1923 Oudh, 154 A receiver has however no right of suit where such right has not been conferred by the terms of his appointment, see 14 Cal 32, at p 390, *ante* After adjudication the Receiver alone is competent to sue, *Sa Dodin v Spiers*, 3 Bom, 437 The power of interference by the receiver in the insolvent's litigations under this section does not exist unless the suit or legal proceeding be in respect of the insolvent's *property* So, if a defendant during the pendency of a money suit against him be adjudicated an insolvent the receiver could not be made a party to the suit *Jethalal v Gangaram* 29 I C 30 The Expression "relating to the property of the insolvent" does not mean "affecting his property" *Subbaraya v Muni Suami Ajar*, *infra* All rights of action, which relate directly to the bankrupt's *property* and can be turned into assets pass to the receiver, but a cause of action arising from the bodily or mental suffering or personal inconvenience of the insolvent or from injury to his person or reputation remains with the insolvent himself *Halsbury's Laws of England*, Vol 2, p 137, para 236 See also *Kheifal Hussain v Azmat Hussain* 54 I C 699 (Pat) This clause will not authorise the receiver to appeal against a decree against the insolvent in a suit for damages, *Subbaraya v Muni Suami*, 51 M L J 613 (1926) M W N 797 A I R 1926 Mad 1133 98

1 C 516 Read also the cases against the marginal note 'Damages for breach of contract' at p 174, *ante* See also *Beckham v Drake*, 2 H L C 579 But a suit to recover deposit money (as distinguished from damages for breach of contract) can be continued in appeal by the Receiver *Ibid* So an insolvent cannot maintain a suit in his own name for the deferred dower of his daughter even though the Receiver has refused to bring such suit, *Khelafat Hussain's case supra* Similarly it has been held that an insolvent cannot defend a suit affecting his estate independently of the receiver since no cause of action survives against him after his adjudication *Tribhuwan Das v Abdul Ali* 39 Bom, 568 But he can continue suit instituted by insolvent for return of the deposit money for breach of contract *Subbarajar v Muni Swami Supra* *Vide* also the notes and cases under the heading "Suits and appeals by or against Insolvent" at p 185 *ante* It has been said that a right of action in respect of a breach of a tort or a breach of contract resulting in injuries wholly to the estate passes to the trustee in bankruptcy *Stanton v Collier* 23 L J Q B 116 The receiver is a necessary party to a proceeding affecting the insolvent's estate Any order affecting the estate in his absence is clearly illegal Proceedings so instituted cannot be rectified by implicating him subsequently in the Appellate Court *Manguluri v Singumalanti* 30 I C 703 18 M L T 200 See also *Muhammad Umar v Munshiram* 54 P R 1917 132 P W R 1017 41 I C 802 which has held that the Receiver is a necessary party to a suit by the insolvent's son to establish his right after an unsuccessful claim put forward in the Insolvency Court But where the receiver has already sold away the insolvent estate to a third party he will not be a necessary party in a suit affecting such estate against the said third party *Kundanlal v Shadiram* 55 P R 1917 13 P R 1917 130 P W R 1917 In a Calcutta case it has been held that the Receiver is not a necessary party to a suit for arrears of rent against the insolvent *Amrita Lal Ghose v Narain Chandra* 46 I C 395 (Cal) But having regard to the dictum of the Judicial Committee in *Kalachand v Jagannath Marwari* cited at p 701 *ante* the above view seems to be no more tenable An interim receiver is however not a necessary party *Re Hunt* 1 B H C R 751 Read also the notes at pp 120 21 *ante* The receiver of an insolvent partner can take legal proceedings for dissolution of the partnership *Sannyasi Charan v Ashutosh* 47 Cal 275 A Court can direct the receiver under this clause to institute a suit to have a question of title relating to the insolvent's estate decided *Satya Kumar v Manager Benares Bank* 3 C W N 100 But before doing so the Court must be satisfied that there are good reasons to justify such a direction (*Ibid*) also see *Nilmoni Choudhury v Durgacharan* 3 C W N 704

under the present Act such a direction is not at all necessary inasmuch as under the new sec 4 the Insolvency Court itself can now decide all such questions of title. A Court can empower a receiver to sue in his own name *William Robert Fink v Moharaj Bahadur* 25 Cal, 642 2 C W N 469, Cf also *Jagat Tarini v Nobo Gopal*, 34 Cal, 305 5 C L J 270. As to Receiver's right to sue for recovery of bets paid by the bankrupt under the English Gaming Act, sec 2, see *Scranton's Trustee v Pearse*, (1922) 2 Ch 87 (C A). As to whether leave of Court is necessary for suing the Receiver, vide under the heading "Leave of the Court" at p 390, ante. This clause does not prevent an insolvent from instituting defending or continuing his own suit or other legal proceeding, *Ram Narain v Behan* 12 A L J 925 2, I C 876. Where an undischarged insolvent brought an action for recovery of a sum due in respect of brokerage from the defendant company, and earned by him subsequent to his adjudication the amount claimed being in excess of his liabilities it was held that as the insolvent was not a nominal plaintiff suing for the receiver in insolvency, no order for costs should be made against him *Murray v E B M Flotilla Co* 46 Cal, 156 s c 22 C W N 1072.

Costs of suit

When a receiver who is a party to a proceeding, is replaced by another, the new receiver should be substituted in the place of the old one *Akla v Delhi*, 28 Mad 157. In case of unsuccessful receiver will not be personally liable for the costs unless his conduct is frivolous *Abdul Rahiman v Shaw Wallace & Co*, A I R 1925 Mad 736 21 L W 516 92 I C 620. When the receiver embarks on a litigation at the importunity of a creditor, the Court can direct the latter to put him in funds necessary for the purpose, *Nilmoni Choudhury v Durga Charan*, 22 C W N 704 46 I C 37. The Receiver can also take an indemnity bond from the creditor for his costs, *Kumar Appa v Murugappa* 36 I C 111 (Mad). Cf *Re Suresh Ch Gojee* 23 C W N 431. As to when the receiver's costs should not be charged on the assets in his hands see 23 C W N 431, *supra*. The Receiver cannot in consideration of deposits stipulate to give them preference *Purushottam Doss & Bros* 55 I R 1929 Mad 385 116 I C 125.

"An assignee in bankruptcy who applies to continue a suit filed by a person before his bankruptcy can be called upon to give security only for the costs incurred in the suit before the Assignee is brought on record and not for the entire costs of the suit till its termination" *Gulam Hussein v Piarally Abdulla*, 97 I C 797.

Interim Receiver The provisions of this section have not been made applicable to interim receivers therefore an interim receiver cannot be a party to a legal proceeding see

Re Hunt, 1 B H C R 251 ; also see at pp 120-21, *ayle*, and he cannot pass a final order in a claim case under this section, *Gobardhan Das v Jagat Narayan*, A I R 1926 Pat 291 1926 P H C C 134 94 I C 506 In fact his position is very much inferior to that of a regular receiver, *Ram Saran v Shiva Prasad*, 58 I C 783 (Pat) , *vide* at p 378

Suit by Receiver in forma Pauperis As to whether the Receiver can sue in *forma pauperis*, the point is not free from difficulty and is not settled by any judicial decision , but such power can be conceded on the analogy of a liquidator's right to sue in *forma pauperis*, see *Perumal Kaundan v Venkatasami*, 41 Mad , 624 34 M L J 421 45 I C 164 But it has been held in an Allahabad case that where a person obtains leave to sue in *forma pauperis* and afterwards becomes an insolvent, his receiver can continue the suit without payment of Court fees, *Mahomed Zaki v Municipal Board of Mainpuri*, 16 A L J 440 47 I C 577 As to the Receiver's obligation to give security for the costs of the suit, see O xxii, r 8, of the C P Code

Lis pendens A Receiver in bankruptcy is not affected by the doctrine of *lis pendens* and a party seeking to bind him by the result of the suit must apply to have him substituted under O xxii, r 10 of the C P Code *Vide* the notes and cases under the heading "Receiver, if bound by decree against insolvent" at p 188 , also see at 200 A decree for sale obtained by an unpaid vendor against his insolvent vendee subsequent to the order of adjudication without impleading the Receiver is a nullity, and the sale held in execution of such a decree confers no title on the auction purchaser, *Mokshagunam v Rama Krishna* 42 M L J 426 16 L W 43 A I R 1922 Mad 335 70 I C 357, cited at pp 183 & 200 *ante* *Vide* also the observation of the Judicial Committee in *Kalachand Banerjee v Jagannath Marwari*, 45 C L J 544 31 C W N 741 52 M L J 734 A I R 1927 P C 108 101 I C 442 (P C)

Clause (e) The powers given by this clause are merely incidental to those conferred by cls (c) and (d) The words "sanctioned etc" seem to be superfluous as the whole clause is subject to 'leave of the Court' When the Court grants the leave there is an *implied* sanction However as we are not entitled to interpret these words as nugatory, it is likely that there should be an *express* sanction A petition for insolvency was transferred by an order of the Court to the Official Receiver for adjudication and administration of the estate The effect of such order was to vest the estate in the receiver or to appoint him as an agent of the Court under cl (e) of this section so as to authorise dealings with the estate by him *Subbah v Rama Saram* 44 Mad 547 40 M L J 209 13 L W 227 (1011 M W N 135 29 M L T 233 67 I C 346 As to the rece

power to employ a solicitor or a pleader see *Re Duncan* (189) 1 Q B 879

Clause (f) The receiver may agree to receive the consideration money for the sale at a future date but proper security should be given by the purchaser, and such security must be previously approved by the Court at the time of giving the lease. A sale by the receiver cannot be impugned on the ground that he agreed to accept deferred payment of the purchase money. The Contract Act has no application to sales by officers of Court. *Shree H a v Sullivan* 5 Bur L T 79 15 I C 368

The receiver is an officer of the Court and when he has good grounds to believe that an enquiry should be made into the conduct of the insolvent the Court can authorise to ascertain the facts and to report them to it, with a view to the adoption of such steps as may be deemed necessary in the interests of justice. If necessary the Court can authorise the receiver to pay a surprise visit. *Monmohan v Hemanta* 23 C L J 553 34 I C 777 Cf sec 59 A post

Clause (g) This sub-section authorises the receiver subject to permission of the Court, to mortgage or pledge the insolvent's properties for the purpose of raising money to pay off his debts. Under sec 115 of the Presidency Towns Insolvency Act a mortgage by the receiver in bankruptcy is exempt from stamp duty. Cf sec 148 of the Eng Bankruptcy Act. But there is no such exemption under the present Act. In respect of the land of a member of an agricultural tribe a temporary alienation can be effected hereunder see *Manji v Girdharilal* 2 Lah 8 61 I C 664. The mortgage should not be made for a term exceeding 20 years and should be automatically redeemed by the profits. *Ibid*

Clause (h) The clause refers to compromise with persons liable to the insolvent estate, *Re Mossaji Ismailji* 5 S L R 249 15 I C 825 (876) Cf 7 Bom L R 954 (957)—on appeal 30 Bom 515. As to receiver's power to compromise suits, comp *Leeming v Lady Murray* (1879) 13 Ch D 123, *Re Pilling* (1906) 2 K B 644. Failure by the Receiver to obtain sanction to a proposed compromise does not invalidate it. *Firm Lalchand v Tejbhandas* AIR 1929 Sind 41 112 I C 452. As to reference to arbitration by consent see *Laduram v Nundlal* 47 Cal 555

59A. [New] (1) The Court if specially empowered in this behalf by an order of the Local Government or any officer of the Court so empowered by a like order

Power to require information regarding insolvent's property

may on the application of the receiver or any creditor who has proved his debt, at any time after an order of adjudication has been made summon before it in the prescribed manner any person known or suspected to have in his possession any property belonging to the insolvent or supposed to be indebted to the insolvent or any person whom the Court or such officer as the case may be may deem capable of giving information respecting the insolvent or his dealings or property and the Court or such officer may require any such person to produce any documents in his custody or power relating to the insolvent or to his dealings or property

(2) If any person so summoned after having been tendered a reasonable sum refuses to come before the Court or such officer at the time appointed or refuses to produce any such document having no lawful impediment made known to and allowed by the Court or such officer the Court or such officer may by warrant cause him to be apprehended and brought up for examination

(3) The Court or such officer may examine any person so brought before it or him concerning the insolvent his dealings or property and such person may be represented by a legal practitioner *

The Section The section has been added by the amending Act of 1926 (*vide* footnote) in accordance with the recommendations of the Civil Justice Committee (*vide* their report para 15 printed elsewhere) and is analogous to sec 36 of the Presidency Towns Insolv Act 1909. It is based on sec 25 of the English Bankruptcy Act of 1883 (now sec 25 of the Bankruptcy Act 1914) and remedies the defect pointed out by Piggot and Walsh JJ in *Quasimili v E peror* 43 All 40 19 A L J 38 64 I C 3 in these words "unfortunately there seems to be no provision in the Prov Insolvency Act as there is in the English Act enabling the Receiver to call the sons before him and to compel to answer questions on oath as to the

* Added by the Prov Insolvency Amendment Act 1926 XXXIX of 1926 which received the assent of the Governor-General the 9th September 1926

disposition of their father's property" Its object is thus to require informations regarding the properties of the insolvent.

"It is of the utmost importance that a Receiver should have this power of investigating all matters relating to the estate which he is called upon to administer, much of which might often be lost to the creditors if

Discoverv of Debtor's property he were compelled to rely only upon such information as the bankrupt may be able or willing to give, or he can ascertain from persons ready to assist him voluntarily. Without it, he would frequently be compelled to choose between abstaining from insisting upon a claim to property to which he is probably entitled, and commencing proceedings without knowing whether they are justified by the facts"—Wace on Bankruptcy, p 84

As to liability of the debtor to disclose his property, see under secs 22 & 24 at pp 128 & 138 39 The section has been added on the recommendation of the Civil Justice Committee to empower the Court "to examine a third party supposed to be indebted to the insolvent in order to elicit information. Such power is given to Courts by a special order of the Local Government and is capable of delegation to a Registrar, where such an officer is appointed at a head quarters Station" See Statements of Objects and Reasons to the Bill (No 41 of 1926) published in the Gazette of India, dated the 21st August, 1926, Part I, p 157 The effect of this section will be to undo the authority of

Joi Chandra Das v Mahammad Amir 22 C W N 702 44 I C 14 which has held that an Insolvency Court has no jurisdiction to summon before it and examine persons with a view to discovering the secret properties of the debtor For procedure adopted by the Court under the old Act for the purpose of such discovery see *Monmohan Lal v Hemanta Kumar*, 23 C L J 553 34 I C 22 Cf *Gobind v Gopal* 9 N L R 182 22 I C 69 Compare the procedure for discovery of property under the Presi Towns Insolv Act, sec 36 see also *Re Suresh Ch Gooye* 23 C W N 431 *Re Sailendra Krishna Roy*, 33 C W N 21

A power under this section can be exercised only by the Insolvency Court if specially authorised in this behalf by an order of the Local Government or by some one of its officers if likewise authorised In absence of such authority, the section has no application An application by the Receiver or a scheduled creditor is necessary for starting a proceeding hereunder and the Court or its authorised officer is not entitled to act *quo motu* The Court cannot be moved by a creditor who has not proved his debt An application under this section should set out fully and in detail the object with which an examination is sought [cf *Seldana Re Ex parte Suklal Karnani* 33 C W N 6-9] and it should be verified As to what is sufficient verification vide *ibid* When a creditor applies for summoning a

witness he has to show good grounds therefor, *Ex parte Nicholson* 14 Ch D 243 46 L J Bk 68 that is, he has to show that by the examination the interests of the creditors will be better served and that it was not intended to cause any annoyance or harrassment to anybody cf *Re Alladinbhoy Hulibhoy* 11 Bom 61 When the Receiver makes an application under this section he should place the Court in possession of fuller materials than stated in the application in question for considering if the application is well founded or not [Cf *Re Seldana supra*] Summoning of witnesses under this section is permissible only after an order of adjudication has been made The bankrupt or the person to whom he has assigned his surplus is obviously not entitled to make an application under this section Cf *Re Hicher Ex parte Sterens* (1888) 5 Morr 173 *Ex parte Sheffield Re Austin* (189) 10 Ch D 434 but see *Ex parte Austin Re Austin* (1876) 4 Ch D 13 The words "any person" are wide enough to include a creditor or the debtor himself so either of them as well as strangers can be examined under this section provided their examination is likely to lead to discovery of property of the insolvent A witness can be summoned under this section for *examination* or for *production* of documents or for both The summoning of witnesses should be in the manner *prescribed* (see secs 2 & 79) and in absence of any specific rule prescribed thereunder it should be in accordance with the provisions laid down in O XVI of the C P Code 1908 See sec 5 *ante* As to the power of the Court to summon before it any *pardanashin* lady witness who is known or suspected to have in her possession any property belonging to the insolvent see *Bilasroy Serowgee In re* 56 Cal 865 33 C W N 681 (a case under the Pres Town Insolv Act)

A B Sec 36 (5) of the Presidency Towns Insolv Act which empowers the Court to order a stranger to make over possession of property to the purchaser from Receiver has no counter part in this section and from this it is not to be inferred that the Court has no such power See 45 Mad 434 cited at p 34 *ante* Cf also 37 All 65 39 All 633 41 I C 802 (Lah) Sec 4 now gives to the Court wide powers in this direction and the case of *Nara Singha v Viraraghava* 41 Mad 440 6 L W 694 (1917) M W N 85 42 I C 525 decided before 1920 can be no authority for the contrary view See *Rama Swami Chettiar's* case cited at p 34 *ante* But the Legislature has not incorporated the said sec 36 (5) herein for the same principle of expediency which prompted sec 4 (3) and proviso to Sec 56 (3) — viz though the Insolvency Court has jurisdiction over strangers (vide it 1 34) still it ought not to foreclose their right of recourse to the ordinary Civil Court Read the learned article in A I R 1927 Journal 37 Read the observations

the Civil Justice Committee (para 15) as to the unsuitability of the provisions of the aforesaid sec 36 (5) of the Presidency Act to the *mafusil* Courts

Summoning and Examination of Witnesses: Such examination can be held in private, *Re Drucker Ex parte Basden*, (1902) 2 K B 210, and if the witness examined is some one other than the debtor, the debtor has no right to be present. *Re Beall* (1894) 2 Q B 135. As to whether the creditor has any right to be present, see *Re Norwich Equitable Fire Insurance Co*, (1884) 27 Ch D 515. Where the debtor is privately examined under this section that will be called his *private* examination as contrasted with his *public* examination under sec 24, *ante*. If a person who has been summoned is unable through illness to attend the Court, his examination may be taken on commission, *Re Bradbrook* (1880) 23 Q B D 116. Where no rules are prescribed under sec 79 *post*, as to the mode or procedure for summoning hereunder, the provisions of O XVI of the C P Code will apply, and the effect thereof will be that the personal attendance of a witness, unless within certain limits, cannot be compelled by reason of O XVI, r 19. But it seems that the provisions of O XVI, r 19 will not apply to the case of the debtor himself, see *Re Cowasji* 13 Bom, 114 and the other cases cited at 129, *ante*. Examination of a witness must be limited to informations regarding the insolvent his dealings or property. Cf *Re Franks, Ex parte Gittins*, (1897) 1 Q B 646, *Re Desportes*, (1893) 10 Morr 40, *Re Easton Ex parte Davies* (1841) 8 Morr 168. *Re Saunderson, Ex parte Leigh* (1896) 13 T L R 108. But questions to test the credibility of the witness may always be put, *Ex parte Tilly*, 20 Q B D 518, 36 W R 388. A witness summoned for examination is entitled to refuse to answer an incriminating question, *Ex parte Schofield* *Re Firth* (1877) 6 Ch D 230, but the debtor is not so entitled. *Ibid* *Reg v Scott*, 4 W R 777, *Reg v Hillam*, 12 Cox C C 174. In an examination under this section it is for the witness to object to such questions as, he considers, are put for an improper purpose and if necessary the witness would be justified on the advice of Counsel in refusing to answer such questions even if directed to do so. Cf *Seldana, Re*, 33 C W N 679. A record of depositions under this section cannot be admitted in evidence in subsequent criminal proceedings under this Act. *Comp Motilal Biswas v Emperor*, 32 C W N 1140, 48 C L J 534 A I R 1929 Cal 80 113 I C 851.

Expenses A person summoned under this section can claim his conduct money and other reasonable expenses such as diet money or compensation for loss of time, *Re Appleton*, (1905) 1 Ch 740 (756). What is *reasonable* may be determined with reference to the expenses allowed to witnesses under O XVI

of the C P Code See also *Re W'cnberg*, 96 L T 790 14 Manson, 277

Production of documents The documents must relate to the property or dealings of the insolvent, *Ex parte Smith, Re Bevan & Co* (1881) 45 L T 447, *Re Saunders, Ex parte Leigh*, (1896) 13 T L R 108, *Ex parte Tatton*, (1881) 17 Ch D 512 Recusancy to produce documents without any justifiable cause is punishable with arrest A servant holding a document and having no authority from his master to produce the document cannot be asked to produce it, *Re Leighton & Bennett*, (1866) 1 Ch App 331, *Ex parte Leicester*, 66 L T 296 40 W R 482.

Represented by legal practitioner The effect of this is that the provisions of O III of the C P Code will apply to the case The expression "legal practitioner" means an advocate, vakil or attorney of any High Court, a pleader, mukhtar or revenue agent See Legal Practitioners' Act (Act xviii of 1879), sec 3 For professional assistance see *Re Greys Co*, (1883) 25 Ch D 400 (405) The right to professional assistance is conceded as the examination may be a step in litigation adverse to the witness *Ex parte Kemp*, (1873) 42 L J (Bcy) 26 (28), *Ex parte Waddell Re Lutscher* (1877) 6 Ch D 328 The pleader who attends on behalf of a witness summoned for private examination under this section is entitled to take notes of the evidence given by such witness for the purpose of re examining him, *Re Walker*, 100 L T 860 16 Manson, 207 But see *Re Greys Brewery & Co*, *supra* *Re London & Northern Bank Ltd Haddock's Case*, (1902) 2 Ch 73, *Learoyd v H J S Banking Co*, (1873) 1 Ch 686 (693), *Re Beall*, (1894) 2 Q B 135 Under the English Law if a witness is examined with a view of proceedings being taken against him and not merely for the purpose of obtaining information from him he is entitled to the costs of employing solicitor and counsel, see *Re Appleton*, (1905) 1 Ch 749 (756), but the language of this section does not go to that extent so in India a witness will not be entitled to anything on that score

Bengal Notifications The following two notifications have been issued by the Bengal Government creating jurisdiction under this section in favour of certain Courts [Published in the Cal Gazette, Pt I, dated the 18th August 1927]

- (a) **Notification No 6956 J** 6th Aug 1927 Is exercise of the power conferred by sec 59A of the Prov Insolv Act 19 the Governor-in-Council is pleased to empower the District Courts of the following Districts to perform the functions referred to in the said section viz (1) 24 Pargannas (2) Burdwan (3) Midnapore (4) Hoogly (5) Dacca, (6) Rajshahi and (7) Dinajpur

- (b) Notification No 6984 J 6th Aug 19 In exercise of the power conferred by sec 50A of the Prov Insolv Act 1900 the Governor in Council is pleased to empower the Additional District Judge of Hoogly at Howrah to perform the functions referred to in the said section

60. [§ 21.] (1) In any local area in which a declaration has been made under section 68 of the *Code of Civil Procedure, 1908*, and is in force, no sale of immovable

Special provisions in regard to immovable property

property paying revenue to the Government or held or let for agricultural purposes shall be made by the receiver but after the other property of the insolvent has been realised, the Court shall ascertain—

- (a) the amount required to satisfy the debts proved under this Act after deducting the monies already received,
- (b) the immovable property of the insolvent remaining unsold, and
- (c) the incumbrances (if any) existing thereon,

and shall forward a statement to the Collector containing the particulars aforesaid, and thereupon the Collector shall proceed to raise the amount so required by the exercise of such of the powers conferred on him by *paragraphs 2 to 10 of the Third Schedule* to the said Code as he thinks fit, and subject to the provisions of those *paragraphs* so far as they are applicable, and shall hold at the disposal of the Court all sums that may come to his hands by the exercise of such powers

(2) Nothing in this Act shall be deemed to affect any provisions of any enactment for the time being in force prohibiting or restricting the execution of decrees or orders against immovable property, and any such provisions shall be deemed to apply to the enforcement of an order of adjudication made under this Act as if it were such a decree or order

This is section 21 of the Act of 1907 It makes provisions

in regard to a special kind of immoveable property, namely *immoveable property paying revenue to the Government or held or let for agricultural purposes*, and its application is limited to the area in respect of which a declaration has been made under sec 68 of C P Code of 1908. It says that the receiver should not sell such a property, but after the other property of the insolvent has been realised, the Court shall first ascertain three things, viz

(i) the balance of money required to pay the insolvent's debts,

(ii) his properties still remaining unsold,

(iii) the incumbrances on his property,

and then send a report of all these to the Collector who shall try to raise the required amount of money by exercising the powers conferred on him by paragraphs 2 to 10 of Sch III of C P Code, 1908. Sub-section (1) will not apply unless a declaration under sec 68, C P Code, is made in the local area concerned, see *Manji v Girdhari Lal*, 2 Lah, 78 61 IC 664 (Lah). When the Collector is entrusted with the duty of selling property paying land revenue in insolvency proceedings, he exercises the powers conferred by paras 2 to 10 of Sch III of C P C and is subject to such rules as have been made by the Local Government in the exercise of the powers conferred upon it by S 70 of the C P C. In such a case the Civil Court has no authority to interfere with the proceedings of the officer conducting the sale. If any question or complaint arises with regard to the holding or the conduct of the sale, the matter must be represented to the officer conducting the sale who is the only person authorised to deal with questions of this kind, *Girdhari Lal v Jhaman Lal*, 49 A 272 25 ALJ 197 AIR 1927 All 203 98 IC 1046. For the same reason, a sale of immoveable property of the kind specified in this section by the Official Receiver is invalid and inoperative, *Nazir Hasan v Matin uz-zaman* 11 O L J 672 AIR 1925 Oudh, 299. There is, however, no absolute bar to the insolvency Court permanently alienating the land of an insolvent or to its departing from the principles governing the execution of ordinary decrees if a fit case is made out for such action, *Lachman Singh v Mahant Ram Das* 29 P L R 606 AIR 1929 Lah 66 117 IC 669 (1).

Held or let for agricultural purposes Agricultural purposes must be for the purpose of cultivating soil, (Cf *Kali Kishen v Jankee*, 8 WR 250), cultivation of indigo is an agricultural purpose, but not manufacture of indigo cakes, *Surendra v Hari Mohan*, 31 Cal 174 9 CWN 8—on appeal to PC 34 Cal 718 11 CWN 791 6 CLJ 19 (PC). Cf *Imrao Bibi v Sayad Mahomed*, 27 Cal, 205 4 CWN 76. For the meaning of the term "agriculturist" as used in sec 60

(c) of C P Code, see *Muthu Venkatarama v Official Receiver, South Arcot*, 49 Mad, 227. 50 M L J. 90 Land let out for an orchard is not land let out for an agricultural purpose, *Summon Gope v Raghubir*, 24 Cal 160 Also see *Ram Chandra v Balaji*, 15 Bom, 76 A lease of land for the cultivation of betel is an agricultural lease, *Kurhayan Haji v Mayan*, 17 Mad, 98 See also *Murugasa v Chinnathambai*, 24 Mad, 421, in which lease etc a

25 Mad, 627 12 M L J 393 It should be noticed that these Madras decisions are not in conformity with the Calcutta decision in *Umrao Bibi v Syad Mahomed*, 27 Cal, 205 4 C W N 76, according to which growing vegetables, planting bamboos and fruit trees are not for an agricultural purpose, *Ibid*, see also *Summon Gope v Raghubir*, 24 Cal, 160 Vide also the author's Bengal Tenancy Act, pp 19-20

Where in pursuance of orders passed by the Civil Court in the exercise of insolvency jurisdiction certain revenue-paying property of the insolvent was sold by the Collector by private contract, it has been held that such a sale did not oust the pre-emptive rights of a person entitled to claim pre-emption, *Kanhai Lal v Kalka Prosad* 27 All, 670, but where the sale takes place by public auction, no such right of pre-emption exists, *Bajrath v Sital Singh*, 13 All, 224. Cf *Sleebarrar v Kulsum unissa*, 49 All, 367 (P C)

Land of a Member of an Agricultural tribe in the Punjab—An Insolvency Court is competent to proceed against the land of an insolvent who is a member of an agricultural tribe and effect a temporary alienation, and it is not necessary that the receiver or the Court should proceed through the Collector, *Manji v Girdhari Lal*, 2 Lah, 78 61 I C 664

This Act does not apply to proceedings in the Revenue Court under Agra Tenancy Act See *Kalka Das v Gajja Singl*, 43 All, 510—followed in *Parbati v Raja Shyam Rikh*, 44 All, 296 (cited at p 3, ante), in which it was held that where a decree of the Revenue Court (under Agra Tenancy Act) was to put to execution and was met by an objection that the property against which execution was levied was already transferred by the insolvent judgment debtor to his wife and son, no suit could be maintained for a declaration that the transfer to wife and son was inoperative to prevent the vesting of the property in the Receiver

Sale by Receiver in contravention of the section: A sale of immovable property of the kind specified in this section by the Receiver is invalid and inoperative, *Nazir Hasan v Matin uz-zaman*, 11 O L J 672 A I R 1925 Oudh, 209

Applicability of the Section when parties are secured creditors When the parties to the proceedings are all secured creditors, the order of adjudication does not bind them. Consequently, they can allow the receiver to bring the insolvent property subject to payment of Government revenue to sale, *Ram Devi v Ganesh*, 48 All , 475 24 A L J 480 A I R 1926 All 501 95 I C 416

Distribution of Property

61. [§ 33] (1) In the distribution of the property of the insolvent there shall be paid in priority to all other debts—

Priority of debts

- (a) all debts due to the Crown or to any local authority, and
- (b) all salary or wages, not exceeding twenty rupees in all, of any clerk servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition

(2) The debts specified in sub section (1) shall rank equally between themselves, and shall be paid in full, unless the property of the insolvent is insufficient to meet them in which case they shall abate in equal proportions between themselves

(3) Subject to the retention of such sums as may be necessary for the expenses of administration or otherwise, the debts specified in sub section (1) shall be discharged forthwith in so far as the property of the insolvent is sufficient to meet them

(4) In the case of partners, the partnership property shall be applicable in the first instance in payment of the partnership debts and the separate property of each partner shall be applicable in the first instance in payment of his separate debts. Where there is a surplus of the separate property of the partners, it shall be dealt with as part of the partnership property, and where there is a surplus

of the partnership property, it shall be dealt with as part of the respective separate property in proportion to the rights and interests of each partner in the partnership property

(5) Subject to the provisions of this Act, all debts entered in the schedule shall be paid rateably according to the amounts of such debts respectively and without any preference

(6) Where there is any surplus after payment of the foregoing debts it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per centum per annum on all debts entered in the schedule

This section corresponds to sec 33 of the repealed Act and is based on sec 40 (4) of the English Bankruptcy Act, 1883 now sec 33 of the Eng Bankruptcy Act, 1914. It lays down the procedure to be followed in the distribution of the property of the insolvent. It says that the following two kinds of debts should be paid first of all, viz

(a) debts due to the Crown or to any local authority

(b) salary or wages (not exceeding (Rs 20) of any clerk or servant of the insolvent during four months before the date of the insolvency petition. Cf Eng Bankruptcy (Amendment) Act, 1926, sec 7

These are in fact the only unsecured debts that enjoy priority. As between themselves, however, these debts rank equally and shall if the insolvent's assets permit, be paid in full or otherwise subject to proportionate abatement. Under the English Bankruptcy Act and the Presidency Act there are certain other debts which also enjoy a priority e.g. compensation payable under the Workmen's Compensation Act or rent due to a landlord (see sec 49 of the Presidency Act) but under this Act such debts enjoy no such priority. In sub-sec (4) we have provisions as to how the partnership property or separate property of the insolvent should be applied in reduction of these debts. After considering all the foregoing items the balance is to be distributed among all the creditors of course rateably and without preference. After all these debts have been satisfied, interests on the debts may be paid from the date of adjudication at the rate of 6 p c p a. Interest stops after adjudication, and cannot be allowed thereafter except in the contingency contemplated in sub-sec (6) of this section.

Cf *Muhammad Ibrahim v Ramchandra*, 48 All 272 21 A.L.J. 244 A.I.R. 1926 All 289 32 I.C. 514 It is needless to mention that the rights of a secured creditor remain unaffected by anything contained in the section, *Richards v Overseers of Kidderminster* (1886) 2 Ch 212. Vide also under the next heading.

Crown debts See O XVIII, r 10, CPC also see *Judah v Secretary of State* 12 Cal 345 Cf *Gyanodai Bhatt v Bhatt* 11 Cal 1190 10 C.W.N. 857 "Where the king's and subject's titles conflict the king's shall be preferred, *Rex v Wells* (1812) 16 East 278. Likewise it has been held in *Re Henley & Co.*, (1898) L.R. 9 Ch D 369 that whenever the right of the Crown and the right of the subject with respect to the payment of a debt of equal degree come into competition the Crown right prevails, *Hales Taxation Commissioner v Palmer* (1909) A.C. 170 *Bank of Upper India v Administrator-General Bengal* 45 Cal 153 22 C.W.N. 793 "It is only when claims of the Crown and claims of common persons (to use an old expression) concur or come into competition that the Crown is preferred. The Crown has no more right than a common person to seize A's property and apply it in or towards the discharge of a debt due from B. That is not a question of law. It is a matter of common justice, and it may be added, of common honesty," per Lord Macnaghten in *Ragho v Mera Lal* 39 I.A. 62 34 All 223 9 A.L.J. 401 22 M.L.J. 457 16 C.W.N. 433 15 C.L.J. 327 at p. 331, P.C. Priority of Crown debts has not been recognised under the Companies Act Cf (1922) 2 Ch 369. Crown debts have however no priority over mortgages *Dost Mohammad Khan v Mani Ram*, 29 All, 517, *Ebrahim Khan v Rangaswami Naicker*, 28 Mad, 420. The ownership of the property passes to the first mortgagee in an English mortgage but not to the puisne mortgagee, and he is not entitled to priority over the Crown, 22 C.W.N. 793, (*supra*), also (1896) 2 Ch 212 *supra*.

Local authority such as Municipalities, District Boards Port Commissioners etc. For definition see s. 3, Cl (2b) of the General Clauses Act, (X of 1897).

Rent Rent is a first charge, see p. 20, and the landlord is in the position of a secured creditor (p. 19), so, he has priority in the matter of payment, but he is not mentioned in this section as this section contemplates only the *unsecured debts*. In this connection see *Bishambhar v Rukhsa*, 81 I.C. 647 (a case under the Oudh Rent Act and cited at p. 19, ante).

Clerks and Servants They must be whole time and not occasional clerks and servants, otherwise they will not be entitled to priority, see *Ex parte Waller*, L.R. 15 I.I. 412 and *Cairney v Back*, (1906) 2 K.B. 746. The wages or salary must

be in respect of personal services rendered by the clerk or servant, not those which he pays some one else, to render, *Ibid* Salary does not include the prospective and contingent earnings of a professional man in the exercise of his personal skill and knowledge, *Ex parte Benwell*, 14 Q B D 301

Labourer "The expression *labourer* denotes persons who earn their daily bread by personal manual labour or in occupations which require little or no art or skill or previous education," *J Chand v Aba*, 5 Bom, 132

Funeral expenses and price of necessities supplied before death — Though these things find no mention here, still it seems that reasonable funeral expenses have to be paid in full before the trustee in bankruptcy (i.e. the receiver) can come in. As regards the unpaid price of necessary commodities supplied to the insolvent before his death, that has to be paid out of the personal earnings of the insolvent, if any, in priority over the receivers claim

Sub-section (4) : Partnership assets — Compare the principle of this sub-section with sec 262 of the Indian Contract Act. Where either all the members of a firm become insolvent, or where one partner is adjudged insolvent, the partnership estate shall be applied to pay off partnership debts, and the separate estate to pay off separate debts, and the surplus to each respectively to pay off the other debts, *Ex parte Cooke*, 2 P Wms 300. On the adjudication of a partner, the creditor of the firm may prove against him, but such a creditor cannot receive a dividend out of the separate estate until all the separate creditors have received the amounts of their respective debts. *Damodar Das v Official Receiver*, 117 IC 145, each estate joint or separate, as the case may be, should pay its own creditors. Cf *Ex parte Kensington*, 14 Ves 447, *Re Budget*, (1894) 2 Ch 557. Where persons carrying on business in partnership are adjudicated insolvents it is open to the creditors to elect as to which assets they will go against, the general assets of the two partners or the separate assets of the one against whom they elect, and they can elect until the very end of the proceedings, and only when they have actually received a dividend, there is an election. Even after they have received their dividend they can still pay it back and proceed against the other assets, *Subramiah v Bansilal Abeerchand* (1924) 117 WN 164 AIR 1924 Mad 595 12 L W 46 79 IC 966. *Vide* also the notes under sec 28 at pp 168 70. In this connection, see *Sardarmal v Aranvayal*, 21 Bom, 205. Where the creditors have a double remedy open to them and they intentionally elect their remedy against the joint estate of the firm they are not estopped from re electing their remedy

against the separate estate of an individual partner, *Harris v. Mackenzie & Co.* AIR 1928 Sind. 10, 105 IC 65 relying on *Ex parte Adamson, Re Cohe* (1855) 5 Ch 507. A decree obtained against a partnership and one of its partners can, in the event of the insolvency of the partnership, be executed against the separate property of the partner, under this clause *Jethalal Chhotalal v. Lalulal* 2 Bom LR 702.

Subsection (5) Rateably, without preference. Bringing the two clauses mentioned in s. 45sec (1), all other debts of the insolvent entered in the schedule are to be paid *pari passu*. Cf *Whitaker v. Palmer* (1901) 1 Ch 9, *Ex parte Pottinger* 5 Ch D 621. Even the judgment creditors have no priority in respect of their debts except in respect of assets realised in execution before the admission of the insolvent petitioner to court. The right of equal division enacted in the section cannot be defeated by the Court on the pretext that the creditor has proved only one of two debts and reserved the other for settlement with the insolvent after his discharge or in other words the Court cannot punish such conduct of the creditor by directing that the debt he has proved be excluded. *Daniels v. Taylor*, 6 SLR 163, 19 IC 4. A person who entrusts gold to the insolvent for the purpose of making jewels will have no preferential claim for the payment of the value of his gold but has to rank *pari passu* with the general creditors, if the gold gets mixed up with the insolvent's general assets, *Mulrizen v. Official Assignee* 1 MIJ 4. 4 IC 37. Payment of dividends under this sub-section may be made *per post*, see rules *infra*. Under sec. 50 (1) particular properties may be divided among the creditors in its existing form. Unclaimed dividends should be deposited in Court. The death of the insolvent does not stand in the way of the distribution of dividends, *Re Sitarani*, 10 Bom 27.

Cl (6) **Interest.** Though ordinarily interest stops after adjudication still if there is a surplus after payment of provable debts interest at the rate of 6 p c p a will be allowed on them from the date of adjudication. *Re Whitakes*, (1904) 1 Ch 293 not following *Re Henley*, (1896) 75 LT 307. Cf *Re Mahomed Shah* 13 Cal 66, also *Re Thomas Petter*, 1 Mad HCR 217. The observations in these two cases—13 Cal 66 and 1 Mad HCR 217 that interest is payable only on debts which expressly or impliedly carry interest do not find any warrant from the wording of this sub-section. *Ganga Sahai v. Mukaram Ali*, 24 ALJ 441 AIR 1926 All 361 97 IC 556, *Re Broune and Wingrove*, (1891) 2 QB 574.

be in respect of personal services rendered by the clerk or servant, not those which he pays some one else, to render, *Ibid* Salary does not include the prospective and contingent earnings of a professional man in the exercise of his personal skill and knowledge, *Ex parte Benwell*, 14 Q B D 301

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against the separate estate of an individual partner, *Ahmad Haji v Mackenzie Stuart & Co*, AIR 1928 Sind, 40 105 IC 366, relying on *Ex parte Adamson, Re Coolie*, (1878) 8 Ch 507. A decree obtained against a partnership and one of its partners can, in the event of the insolvency of the partnership, be executed against the separate property of the partner, under this clause, *Jethalal Chhotalal v Lallubhai*, 32 Bom LR 702.

Sub section (5): Rateably...without preference Barring the two instances mentioned in sub-sec (1), all other debts of the insolvent (if entered in the schedule) are to be paid *pari passu*. Cf *Whitaker v Palmer*, (1901) 1 Ch 9, *Ex parte Pottinger*, 8 Ch D 621. Even the judgment creditors have no priority in respect of their debts except in respect of assets realised in execution before the admission of the insolvency petition [see 51]. The right of equal division enacted in the section cannot be defeated by the Court on the pretext that the creditor has proved only one out of two debts and reserved the other secret for settlement with the insolvent after his discharge, or in other words the Court cannot punish such conduct of the creditor by directing that the debt he has proved be excluded. *Dhanji v Taylor*, 6 SLR 163. 19 IC 385. A person who entrusts gold to the insolvent for the purpose of making jewels will have no preferential claim for the payment of the value of his gold but has to rank *pari passu* with the general creditors, if the gold gets mixed up with the insolvent's general assets, *Mulrazzu v Official Assignee*, 21 MLJ 40, 29 IC 5. Payment of dividends under this sub-section may be made per post, see rules *infra*. Under sec 59 (1) particular properties may be divided among the creditors in its existing form. Unclaimed dividends should be deposited in Court. The death of the insolvent does not stand in the way of the distribution of dividends, *Re Sitaram*, 10 Bom 58.

Cl (6) Interest. Though ordinarily interest stops after adjudication, still if there is a surplus after payment of provable debts interest at the rate of 6 p c p a will be allowed on them from the date of adjudication. *Re Whitakes* (1904) 1 Ch 299 not following *Re Henley*, (1896) 75 LT 307. Cf *Re Mahomed Shah*, 13 Cal 66 also *Re Thomas Pereira*, 1 Mad HCR 217. The observations in these two cases—13 Cal 66 and 1 Mad HCR 21, that interest is payable only on debts which expressly or impliedly carry interest do not find any warrant from the wording of this sub-section. *Ganga Sahai v Mularam Ali* 24 ALJ 441 AIR 1926 All 361 97 IC 556, *Re Browne and Hingroze*, (1891)

62. [§ 39] (1) (2)] (1) In the calculation of dividends, the receiver shall retain in his hands sufficient assets to meet—

Calculation of dividends

- (a) debts provable under this Act and appearing, from the insolvent's statements or otherwise to be due to persons resident in places so distant that in the ordinary course of communication they have not had sufficient time to tender their proofs;
- (b) debts provable under this Act, the subject of claims not yet determined,
- (c) disputed proofs or claims; and
- (d) the expenses necessary for the administration of the estate or otherwise.

(2) Subject to the provisions of sub-section (1), all money in hand shall be distributed as dividends

This is section 59 (1) and (2) of the Act of 1907 and is taken from sec 63 of the Bankruptcy Act, 1883, which is re-enacted in sec 64 of the Bankruptcy Act, 1914. It corresponds to sec 71 of the Presidency Act

Reason of the Section The reason of this section and the next few sections has been thus given in the statement of Objects and Reasons to the Act of 1907 —“The Code of Civil Procedure does not regulate the payment of dividends and there is accordingly no direction with regard to provision for debts not provable at once. The principle has already been recognised that a creditor can claim to prove at any time while there are still undistributed assets of the insolvent. It is essential, however to qualify this by providing for the maintenance of any prior payment of dividends, and also to protect a receiver against suits for dividends unpaid, the Court being at the same time vested with the power to order payment, with costs and interest improperly withheld.”

This section lays down the procedure to be followed by the receiver in calculating the dividend to be paid to the creditor. Before distributing the dividends the receiver should retain in his hands sufficient assets to meet the debts or expenses mentioned in clauses (a), (b), (c) and (d) of sub-

section (1) As to the order or manner in which the debts are to be paid see sec 61 above This section provides that in calculating the dividend the Receiver is to take into account the debts of the specified description As to the position of a secured creditor with respect to the assets of the insolvent, see sec 47 above Sec 65 bars a suit for dividend, but the receiver can be compelled by the Court to pay it down when he refuses to do so

In a Calcutta case decided under the Presi Towns Insolvency Act, the Official Assignee distributed the assets after deducting his commission to the two scheduled creditors, though he had notice of other creditors whose claims were neither admitted nor rejected, and the Court held that he was *personally* liable for the amounts which those creditors were deprived of *Re Archibald Gilchrist Peace*, 20 C W N 653

A receiver is not bound to retain any part of the assets to meet the claim of a secured creditor who has neither assessed, nor relinquished his security under sec 4 nor is he *personally* liable for failing to keep a sufficient reserve as contemplated by this section *Ex parte Good* 14 Ch D 52 Where by reason of special circumstances a secured creditor failed to realise his security before declaration of dividend the Court has power to give suitable directions as it considers just and equitable for payment of the unsatisfied portion of the secured creditor's dues *Ibid*

Sub-section (2) Subject to the provisions of sub sec (1) all money in the hand of the receiver should be distributed as dividends The receiver cannot however either retain in his hands or distribute as dividends moneys found to be belonging to other persons than the insolvent *Ex parte James* L R 2 Ch 600 For instance where the wife paid premiums on the life policy of her husband the receiver could not retain the policy moneys without repaying the wife the sums she had paid for premiums *In re Tyler* (11) 1 K B 865 *Re Hall* (1901) 1 K P 55 In case of over payment to any particular individual the Receiver can stop payment of subsequent dividends to him till payments to the other creditors are levelled up to the proportion received by the over paid creditor *Re Searle Hoare & Co* (1941) Ch 75

Subsequent interest Subsequent interest though it cannot be taken into account at the time of the first distribution of dividends has to be paid out of the assets if sufficient is part of the debt *Mahomed Ibrahim v Ramchandra* 48 All 272 24 A L J 244 A I R 1976 All 289 97 I C 516

63. [§ 39 (3)] Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid, out of any money for the

Right of creditor who has not proved debt before declaration of a dividend

time being in the hands of the receiver, any dividend or dividends which he may have failed to receive before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein

This is sec 39 (3) of the Act of 1907, and corresponds to sec 65 of the Eng Bankruptcy Act 1914 and sec 7 of the Presidency Act, 1909

This section provides for the case of a creditor who does not come forward to prove his debt before declaration of a dividend and says that such a creditor is to be satisfied as far as practicable from the funds still in the hands of the receiver Cf *Ajudhia Nath v Anant Das* 3 All 799 *Hira nand Mulchand v Official Receiver infra Babu Lal v Krishna Prosad* 4 Pat 128 85 IC 543 It does not however ever er or to disturb the distribution o e his debt was proved In Re of a creditor was allowed to be secured in appeal (before the High Court)

Any Creditor These words show that it is possible for a creditor to prove a debt after the declaration of a dividend So it has been held that a creditor may come in and prove so long as there are assets available for distribution, *Re Mc Murdo* (1907) 2 Ch 684 and that a creditor may come in to prove his debt at any time before a final dividend is declared *Ex parte Boddan* 2 DF & J 625 See in this connection the following cases *Henry Harrison v G E Kirk* (1904) AC 1 *Hicks v May* (1879) 13 Ch D 236 *Sivasubramanian v Theellappa* 4 Mad 120 45 MLJ 166 75 IC 572 The creditor so coming is paid out of the funds in the hands of the receiver So the receiver's liability is limited to that extent *Rout v Gregory* 24 QBD 281 But it seems that if the Receiver gets notice of the claim of such a late-comer, he cannot altogether ignore him unless he is excluded from the schedule by an order of the Court, if he does so he will be personally liable Cf *Re Archibald Gilchrist Peace* 26 CW 653 cited under the preceding section The remedy of a Mahomedan wife

ed to deferred dower lies under this section, if her husband predeceases her or divorces her and the insolvency proceedings are still continuing. It is then that her claim matures and she can claim a share of the insolvent's assets still remaining with the receiver, *Sughra Bibi v. Gaya Prosad*, 123 I C 754. Cf. *Mirza Ali v. Qadiri Khanam*, 21 P L R 1919 75 I C 774.

Late-comers. Creditors who prove their claim after declaration and payment of any dividends, do not rank *pari passu* as between themselves, but are entitled to payment in full in the order of their proving their respective claims, provided funds are still available. The claim of any such creditor cannot be held up until the claims of all such creditors are decided, *Hiranand Mulchand v. Official Receiver*, 100 I C 791 (Sind).

64. [§ 39 (4)]. When the receiver has realised all the property of the insolvent or so much thereof as can, in the opinion of the Court, be realised without needlessly protracting the receivership, he shall declare a final dividend, but before so doing, he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified but not proved, that if they do not prove their claims within the time limited by the notice, he will proceed to make a final dividend without regard to their claims. After the expiration of the time so limited, or if the Court, on application by any such claimant, grants him further time for establishing his claim, then on the expiration of such further time, the property of the insolvent shall be divided among the creditors entered in the schedule without regard to the claims of any other persons.

This is section 39 (4) of the Act of 1907. It corresponds to sec 67 of the Eng. Bankruptcy Act and sec 73 of the Presidency Act.

Here we have the direction as to when the final dividend is to be declared. The section makes it clear that after every possible facility has been given to claimants to come forward to prove their claims, the receiver should proceed finally to divide the assets among his creditors. Under this

63. [§ 39 (3)] Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid, out of any money for the

Right of creditor who has not proved debt before declaration of a dividend

time being in the hands of the receiver, any dividend or dividends which he may have failed to receive before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein

This is sec 39 (3) of the Act of 1907, and corresponds to sec 65 of the Eng Bankruptcy Act, 1914, and sec 72 of the Presidency Act, 1909

This section provides for the case of a creditor who does not come forward to prove his debt before declaration of a dividend and says that such a creditor is to be satisfied as far as practicable from the funds still in the hands of the receiver. Cf *Ajudhia Nath v Anant Das* 3 All 799 *Hira Chand Mulchand v Official Receiver, infra Babu Lal v Krishna Prosad*, 4 Pat 128 85 IC 543. It does not however entitle such a late coming creditor to disturb the distribution of any dividend declared before his debt was proved. In *Re Cobbold* 36 Cal 512 the claim of a creditor was allowed to be scheduled in appeal (before the High Court)

Any Creditor These words show that it is possible for a creditor to prove a debt after the declaration of a dividend. So it has been held that a creditor may come in and prove so long as there are assets available for distribution, *Re Mc Murdo* (1907) 1 Ch 684 and that a creditor may come in to prove his debt at any time before a final dividend is declared. *Ex parte Boddam* 2 D F & J 675. See in this connection the following cases: *Henry Harrison v G E Kirk* (1904) AC 1 *Hicks v May* (1870) 13 Ch D 236 *Sivasubramania v Therthappa* 47 Mad 120 45 MLJ 166 75 IC 572. The creditor so coming is paid out of the funds in the hands of the receiver. So the receiver's liability is limited to that extent. *Rout v Gregory*, 24 Q B D 281. But it seems that if the Receiver gets notice of the claim of such a late comer, he cannot altogether ignore him unless he is excluded from the schedule by an order of the Court, if he does so he will be personally liable. Cf *Re Archibald Gilchrist Peace* 26 CWN 653, cited under the preceding section. The remedy of a Mahomedan wife

entitled to deferred dower lies under this section, if her husband predeceases her or divorces her and the insolvency proceedings are still continuing. It is then that her claim matures and she can claim a share of the insolvent's assets still remaining with the receiver, *Sughra Bibi v Gaya Prosad*, 123 IC 754. Cf *Mirza Ali v Qadiri Khanani* 21 P L R 1919 50 IC 774.

Late-comers Creditors who prove their claim after declaration and payment of any dividends do not rank *pari passu* as between themselves but are entitled to payment in full in the order of their proving their respective claims, provided funds are still available. The claim of any such creditor cannot be held up until the claims of all such creditors are decided *Hiranand Mulchand v Official Receiver*, 100 IC 791 (Sind).

64. [§ 39 (4)] When the receiver has realised all the property of the insolvent or so much thereof as can, in the opinion of the Court, be realised without needlessly protracting the receivership, he shall declare a final dividend, but before so doing, he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified but not proved, that if they do not prove their claims within the time limited by the notice, he will proceed to make a final dividend without regard to their claims. After the expiration of the time so limited, or if the Court on application by any such claimant, grants him further time for establishing his claim, then on the expiration of such further time the property of the insolvent shall be divided among the creditors entered in the schedule without regard to the claims of any other persons.

This is section 39 (4) of the Act of 1907. It corresponds to sec 67 of the Eng Bankruptcy Act and sec 73 of the Presidency Act.

Here we have the direction as to when the final dividend is to be declared. The section makes it abundantly clear that after every possible facility has been given to the absent likely claimants to come forward to prove their debts the receiver should proceed finally to divide the assets of the insolvent among his creditors. Under this section, the creditor can

creditor who is entered in the schedule, order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld, and the costs of the application

This is section 39 (5) of the Act of 1907. See sec 68 of the Eng Bankruptcy Act 1914 and sec 74 of the Presidency Act 1909. It bars a suit for dividend against the receiver. Where the receiver refuses to pay any dividend the proper course for an aggrieved creditor, if entered in the schedule is to apply to the Court which may if it thinks fit order the receiver to pay down the amount together with costs and interest out of his own pocket. Cf *Ringwood's Bankruptcy*, 15 Ed, p 193. Silence on the receiver's part when a demand for dividend is made by a creditor amounts to a refusal to pay the same. See *Ex parte Jackson* (1842) 3 Mont D & D 1. The section does not however say what consequence will follow if the receiver does not carry out the order of the Court. We are apt to think that the Court has inherent jurisdiction to enforce its order by taking measures similar to those contained in sec 56 sub sec (4) or by directing execution or by means of contempt proceeding for disobedience of the Court's order. Cf *Re Prager* 3 Ch D 115.

Entered in the Schedule. The creditor in order to be entitled to apply under this section must have his name entered in the schedule. So where a creditor proves his debt and then assigns to another but the assignee does not get his name entered in the schedule it has been held that the latter cannot apply to enforce payment of dividend. *Ex parte Official Receiver* (1899) 2 Q B 585. *Re Frost* (1899) 2 Q B 50. But the assignee can with the leave of the Court tender proof instead of the assignor. *Re Hiff* 51 W R 80. Cf *Re Maine* (1907) 2 K B 899. For the same reason a person obtaining a judgment against the creditor cannot by garnishee proceedings attach the dividend. *Pratt v. [?]* 24 Q B D 81. Cf *Re Cook Ex parte Crisp* (1899) Q B 86. In fact a creditor whose name is not entered in the schedule cannot be reckoned for the purpose of the distribution of the assets of the insolvent. *Re Chunnill Official* 9 Cal 503.

Appeal. No appeal lies to the High Court as a matter of right against an order under this section though there may be an appeal with leave under sec 66 (1).

66 [§ 39] (1) The Court may appoint the insolvent himself to superintend the management of the property of the insolvent or of any

Management of insolvent
alliance to insolvent

part thereof, or to carry on the trade (if any) of the insolvent for the benefit of the creditors and in any other respect to aid in administering the property in such manner and on such terms as the Court may direct

(2) The Court may, from time to time, make such allowance as it may think just to the insolvent out of his property for the support of himself and his family, or in consideration of his services if he is engaged in winding up his estate, but any such allowance may, at any time, be varied or determined by the Court

This is section 40 of the Act of 1907 and makes provision for management of the insolvent's estate by the insolvent himself and for giving an allowance to him for his support and for the support of his family. Compare this section with sec 57 and 58 of the Eng Bankruptcy Act, 1914 and section 75 of the Presidency Act. The section speaks of the *support* of the insolvent and his family. So it is difficult to say whether the English rule which allows the insolvent all his expenses for defending himself on a capital charge, can be applied in this country. Cf *Re Charwood Ex parte Masters*, (1894) 1 Q B 641 (646)

The reason for this Section The object of this section is to remove "one of the worst stumbling blocks in the way of insolvent relief". The measures recommended in the section facilitate the best realisation of the assets of the insolvent and remove the considerations that may deter people in insolvent circumstances from seeking the benefit of the existing law. See Statement of Objects and Reasons to the Bill of 1907

Sub section (1) To superintend the management etc
124 Under this sub section the Court has the discretion to allow the insolvent to retain the management of his property or to carry on his trade for the benefit of his creditors. The exact significance of the word 'superintend' is doubtful. Does it signify that the Court cannot give the insolvent actual management over his property but only the power of superintendence? Supervision and actual management are quite distinct things. The same words also occur in the English Bankruptcy Act and the cases decided under the said Act also go to show that not only the *power of supervision* but *actual management* may be entrusted to the insolvent.

The insolvent while managing the property (as contemplated in this section) will be considered to be acting in a fiduciary character. *Ex parte Masters*, 18 Eq 101

Trade in this section does not include the business of a *panda*, see *Ananda v Gonesh*, 40 Cal, 678. The word "trade" is more restricted and narrower in scope than the word "business" and refers to the particular calling or profession of the insolvent. An isolated business transaction may be trade, if there is an intention of gaining and continuing to gain in order to eke out an existence, *Ex parte Board of Trade, Re Moullon*, (1890) 8 Morr 1, *vide* notes on "Carry on business" at pp 94 95, *ante*, also notes on sec 42 (1) (c). When an undischarged insolvent carries on the trade with the permission of the Court under this section, all profits therefrom must accrue to the benefit of the creditors, because it is for that purpose that the Court can give the insolvent management of his trade or property. But where the insolvent retains the management of his property or trade not under this section, and acquires properties during such management, and then becomes a bankrupt a second time, a question may arise as to whether such new acquisition will be available to the creditors of the first bankruptcy or the second bankruptcy. There seems to be a conflict of opinion on this point in the English Courts, see *Re Clark, Ex parte Beardmore* 29 Q B 393 *Cohen v Mitchell*, 8 Mor 236, *Bird v Philpott*, 1900 4 Ch 822. Property acquired in the course of trade under this section is subject to all the obligations that may arise as incidents of such trade. *Moses Kerokoose v Benjamin Brooke*, 8 MIA 339 4 WR 61.

Sub section (2): Allowance to Insolvent: The allowance which the Court can give to the insolvent under this section, must be either (1) as mere *subsistence* allowance to the insolvent and his family, or, (2) as remuneration when the insolvent is engaged in winding up his estate. Such allowance may however at any time be varied or stopped by the Court. The word *may* shows that the Court has a discretion in the matter. Where the insolvent earns a salary, no special allowance need be made as under section 61 of the C P Code, the insolvent is entitled to retain one half of it. Cf *Ram Chandra v Shanti Charan* 19 CLJ 83 15 CW N 1052 21 IC 950. Also see *Jamnadas v Pinnayak* 15 AIR 10 13 IC 605. *Tulsi Ram v Gur Sham* 18 IC 410 and *Debi Prasad v Jais* 40 All, 211 16 AIJ 107 43 IC 954. *Debi Prasad's* case has however been dissented from in a later case *Radha Mohan v White* 45 All 64 21 AIJ 216 AIR 1923 All 465 13 IC 415, in which it has been maintained that it is open to the Insolvency Court under this sub-section to make out of the disposable half of the salary suitable allowance for the support of the insolvent and his family. Having regard to the general manner in which the word 'property' is used in the section and to the discretion vested in the Court for varying

the amount of allowance, this decision of the Allahabad High Court is literally correct when it says that in fixing the allowance, the Court is not limited to the one moiety of the salary which is exempted by sec 28 (5) of this Act read with section 60 of the C P Code. But unfortunately the judgment is lacking in such words of caution as might provide safeguard against mis-application of it by the subordinate Courts. It should be noted that the whole section is discretionary, and by fixing a moiety limit in sec 60 of the C P C the Legislature meant to furnish a guidance for the exercise of that discretion. Unless exceptionally strong circumstances are established this ordinary limit should not be transgressed. Besides the exclusion of the non-divisible moiety from the category of property is only for the purposes of sec 28 (5), and not for the purposes of this section. Cf *Narasimam v Hanumanth Rao*, (1922) M W N 717 A I R 1922 Mad 439 70 I C 59.

Variation of allowance Under this section the Court has the power to *vary* or *determine* the allowance according to circumstances. Where the allowance is fixed by a superior Court, to which the matter is carried by way of appeal or revision, a question of some nicety may arise as to by which Court the variation is to be effected. We are apt to think that where variation is sought by means of a review it is only the superior Court that can be resorted to, but where the intended variation is grounded upon change of circumstances, the Court of first instance will have jurisdiction to interfere notwithstanding the fact that the allowance was fixed by the Court of appeal.

67. [§ 41] The insolvent shall be entitled to any surplus remaining after payment in full of his creditors with interest as provided by this Act, and of the expenses of the proceedings taken thereunder.

Right of insolvent to surplus This is sec 41 of the Act of 1907 and sec 69 of the Bankruptcy Act, 1914. It corresponds to sec 76 of the *Presb Towns Insolv Act*, 1909 and lays down that the insolvent is entitled to any surplus remaining after payment in full of his creditors with interest and of the costs of the proceedings. For "payment in full," see p 234 and for interest "as provided by this Act", see secs 48 and 61 (6).

Surplus The surplus to which the insolvent is entitled must be ascertained after payment in full of the creditors' debts with interest and after deducting all costs of the insolvency proceedings. As to how interest is to be calculated, see sec 48 and as to the order or mode in which the debts are to be

paid see sec 61, *ante* Before any surplus is made over to the insolvent, interest on the scheduled debts subsequent to the date of the adjudication should also be paid. The costs of the proceedings are also to be deducted from such surplus. It is only after all such payment that the balance if any can be paid over to the insolvent. *Re Hawkins* (1892) 1 Q B 890. So long as such surplus is not paid to the insolvent, the Receiver will continue to be a trustee for the insolvent in respect of the same, [*Bird v Philpott*, (1900) 1 Ch D 822, Cf 10 Ch D 434, *infra* also *Subbaraya v Vythilinga* 16 Mad, 85], and this implies that a subsequent unsatisfied judgment creditor can claim to be paid out of the fund in the trustee's hands and ask for a charging order on the surplus [*Re Prior*, (1921) 3 K B 333], and that the insolvent can claim to have an account tendered to him by the trustee, Robson p 637. Though the insolvent has an interest in the surplus still his interest is not such as will entitle him to interfere either with the administration of the estate or the conduct of the insolvency proceedings, *Ex parte Sheffield*, 10 Ch D 434. *Re Leadbitter* 10 Ch D 388. The insolvent's interest in the surplus is a definite interest (even before it is ascertained) and admits of disposition by will or otherwise *Bird v Philpott* (1900) 1 Ch D 822 (and it should be remembered that a devise of estate is not revoked by bankruptcy, *Charman v Charman* 14 Ves 580 *Banks v Scott* 5 Mad 493). The bankrupt may mortgage his expectation of a surplus, *In re Evelyn* (1894) 2 Q B 302. But the interest of the assignee of the prospective surplus is of *contingent* character and does not give the assignee the right to intervene until it is ascertained whether or not there is a surplus. *Ramchandra v Nipunge*, 25 Bom L R 499 A I R 1924 Bom 49 73 IC 379.

Appeal. An appeal may be taken against an order refusing to give the insolvent the surplus in the Receiver's hand. *Comp Namer Singh v Haman Singh* P L R 1910 144 P W R 1910 8 IC 222.

67A. [New] (1) The Court may if it thinks fit, authorise the creditors who have proved their debts to appoint a committee of inspection for the purpose of superintending the administration of the insolvent's property by the receiver.

(2) The persons appointed to a committee of inspection shall be creditors who have proved their debts or persons holding general powers of attorney from such creditors.

(3) The committee of inspection shall have such powers of control over the proceedings of the receiver as may be prescribed *

Object and Scope of the Section This section is new and has been added by the amending Act, 1926 (*vide* Footnotes). It corresponds to sec 20 of the Eng Bankruptcy Act, 1914 and sections 88 and 89 of the Presidency Towns Insolvency Act (III of 1909). It has been inserted here on the recommendation of the Civil Justice Committee in order "to enable a Court to authorise the appointment from among the creditors a committee of inspection for the purpose of superintending the administration of the insolvent's property by the Receiver,"—Statement of Objects and Reasons for Bill No 41 of 1926, published in the Gazette of India, dated the 21st August, 1926 Part V, at p 137. Read also the Civil Justice Committee Report p 235. The words "may," "if it thinks fit" clearly show that the exercise of jurisdiction by the Court under this section is purely a matter of *discretion* with it. The term "discretion" in relation to a Court always means "judicial discretion"—a legal expression seldom fully appreciated by our Courts. *Vide* the learned article published in A I R 1927 Journal, at p 79. Read also in this connection the notes and cases at p 73 of the author's Guardians and Wards Act. Except when bewildered by the complexity of a case or disturbed by the effrontery of an over zealous advocacy, our Courts are hardly conscious that they have got a discretion which they are to use in the interest of justice and *wisely*. Authority to appoint a committee of inspection can be conferred only on those creditors, who have *proved their debts* (*vide* sec 33). So there can be no committee of inspection until the proceedings have reached the stage contemplated by section 33, *supra*. Under sub-section (2), only the creditors *who have proved their debts* or their attorneys (holding *general* powers) can be members of the committee. As to the powers of the committee of inspection, rules have to be framed under section 79. The section is silent as to how the Court can be moved to grant the authority contemplated herein. It seems the Court can proceed here under either *suo motu* or on the motion of a creditor or creditors. For the meaning of the term 'prescribed' see sec 2 (1) (c).

Committee of Inspection A committee of inspection is appointed under this section for the purpose of superintending the administration of the bankrupt's property by the Receiver. "The general body of creditors is normally too large and

* This section has been added by the Provincial Insolvency (Amendment) Act 1926 (XXIX of 1926) which received the assent of the Governor-General on the 9th September, 1926.

scattered to be capable of rapid decision, but as the creditors are the persons whose interests are at stake it is desirable that any decisions relating to important matters should carry their authority"—Ringwood's *Bankruptcy*, 15 Ed, p 82 And to achieve this object, the present section has been enacted From the use of the word "shall" in sub sec (2) it is evident that the committee cannot include persons other than creditors proving their debts or their attorneys As to what powers the committee will have over the proceedings of the Receiver that will depend upon the rules to be framed under sec -9 *infra* Ordinarily the decisions of the committee will be arrived at by means of votes and resolutions Under the Bankruptcy law of England the committee must consist of not more than five nor less than three persons and while consisting of less than three persons, it cannot authorise the Receiver to do any act Cf *In re Geiger* (1915) 1 K B 439 It is doubtful whether the committee can rescind its own resolution or an order of the Court is necessary for the purpose Cf *Re Marsden* (1892) 9 Morr 70 As to how far the committee's resolutions are binding upon the Receiver see *Re Ridgway* (1889) 6 Morr 277 *Re A & F G Ridgway* (1891) 8 Morr 289 Cf *Re Smith* (1886) 3 Morr 202 *Re Larasour* (1900) 7 Mans 262 For further enlightenment on this subject vide Halsbury's *Laws of England* Vol II pp 113 114, also *Re Gallard* (189) 2 Q B 8 *Chaplin v Young* (1864) 33 Beav 414 No member of a committee of inspection is entitled to derive any profit from any transaction arising out of the bankruptcy except with the sanction of the Court The sanction of the Court cannot be given after the profit has been derived but must be obtained before the business from which the profit is to be derived is undertaken *In re Gallard* (1896) 1 Q B 68 As to the consent of the committee for appointment of a solicitor by the Receiver, see *Ex parte Hite* 29 W R 632

Appeal to Court against receiver

68 [§22] If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the receiver, he may

Appeal to Court
against receiver

apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of and make such order as it thinks just

Provided that no application under this section shall be entertained after the expiry

twenty one days from the date of the act or decision complained of

Scope of the Section This is sec 22 of the Act III of 1907 It corresponds to sec 80 of the Eng Bankruptcy Act 1914 and sec 86 of the Presidency Act, 1909 and provides a remedy for persons aggrieved by an act or decision of the Receiver Cf sec 90 of the Bankruptcy Act, 1883, and 46 All 16, *infra* It is restricted in its operation to matters which the Receiver has done in the course of the insolvency proceeding in respect of the insolvent's estate, *Jhunkoo Lal v Peary Lal* 39 All, 204 15 A L J 49 38 IC 613, *Moses Menahim v Ahraim Solomon*, A I R 1925 Bom 233 84 IC 684 That is the acts or decisions against which a right of appeal is given by the section must be such acts or decisions as arise in the course of the Receiver's official duties

Receiver here includes
Official Receiver

Anantanarayan v Ramasubba 47 Mad 673 79 IC 395 (*infra*) This right of appeal against the act or order of the

Receiver is not confined to orders made by the Receiver under secs 56, 57 and 59 of the Act, but extends to all the orders of the receiver Even the orders of the Official Receiver under sec 80, are subject to appeal to the Court under this section see sec 80 (2), also *Chidambaram v Nagappa*, 38 Mad, 15 4 M L J 73 16 IC 820, Cf 40 Mad 752 *infra* A decision by an Official Receiver that a certain debt is due by the insolvent is appealable hereunder, *Anandji Damodar v James Finlay & Co* 62 IC 441 (*infra*) When the action of the Receiver is irregular and has prejudiced the general interests of the creditors the Court can set aside the Receiver's order *Rama Bhadra v Ramaswami* 44 M L J 284 73 IC 374 The section has given a right of appeal to the insolvent, or a creditor or any other person, who is aggrieved by an act or decision of the receiver see *Data Ram v Deokinandan* 1 Lah 307 58 IC 6 Under this section the District Court has jurisdiction to deal with an application by the purchaser of the property of an insolvent at a sale held by the Official Receiver to the effect that his bid might be accepted and that the sale to another person be held to be invalid No regular suit is necessary for the purpose *Ramalingam Pillai v Official Receiver Trichinopoly* 41 M L J 211 14 L W 234 64 IC 524 The section presupposes that the decision is by a Receiver properly appointed So where the Receiver is not legally appointed he will be a mere intermeddler with the insolvent estate and this section will not apply to his acts or sales *Sankara Rao v Ramkrishna* 46 M L J 184 43 M L T 2 19 L W 450 (1924) M W N 198 A I R 1924 Mad 461 78 IC 294 (206) An order made by the Court while exercising an appellate or

revisional jurisdiction over the Receiver under this section is not *final* within the meaning of sec 75, and is therefore open to appeal under that section, *Alla Pichai v Kuppha Pichai*, 40 Mad, 752 39 I C 420, 32 M L J 449

The section is only permissive and not mandatory. This section is not mandatory and does not debar a person who considers himself aggrieved by an act of the Official

Receiver from bringing an ordinary civil suit against the Receiver, *Maharana Kunwar v David*, 46 All, 16 21 A L J 717 A I R 1924 All 40 7 I C 57 *Vide* also the notes and cases at pp 428 29, *infra*. This section has no application to a case where the plaintiff's property is attached in execution of a decree against a certain person who subsequent to the attachment becomes insolvent and the plaintiff brings a suit for a declaration of his title to the property impleading the Receiver as a party, *Mohini v Baijnath* 40 All 582 16 A L J 456 46 I C 304. The High Court has no jurisdiction to hold an enquiry into the conduct of the Official Receiver after the insolvency has come to an end, though in an existing insolvency it might as a special case tender advice or give directions to the Insolvency Judge, *Varayan Das v Chiman Lal* 49 All 321 25 A L J 19 A I R 1927 All 166 102 I C 191. As to the Court's power over the Receiver *vide* at p 376

Meaning of "Act" A mere omission or refusal to take action at the request of a creditor does not amount to an "act" within the meaning of this section *Anantanarayan v Ramasubba* 47 Mad 6-3 18 L W 857 A I R 1924 Mad 345 79 I C 395. Where the Receiver refuses to take steps under sections 53 and 54 the creditor's remedy is not by way of an appeal under this section, but he can himself move the Court under those sections, *Ibid*. *Vide* also sec 54A.

Court can act suo motu Though the section authorises an aggrieved person to make an application under this section, that does not mean that such an application is an indispensable pre requisite for its operation. The Court can *of itself* rectify and reverse or modify the acts or decisions of the Receiver and this section is no bar thereto *Data Ram v Deoki Nandan* 1 Lah 6 58 I C 6 Cf *Nagobai v Zinjarde* 1 L R 46 A I R 1929 Nag 338

Person aggrieved The expression means a person who has suffered a legal grievance against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully affected his title to something. It does not really include a person who is disappointed of a benefit which he might have received if some order other than the one complained of had been made see *Ex parte*

Who can appeal

Sidebotham 14 Ch D 458 (465) The word "person" is wide enough to include persons other than the parties to the insolvency proceeding, so, even a stranger can appeal under this section if he is aggrieved by any of the acts or decisions of the Receiver. If by reason of the Receiver's act a man is placed in an embarrassing situation he will have a right of appeal under this section, *Ex parte Ellis*, 2 Ch D 767, *Cf Bhairo Pershad v Dass*, 17 A L J 787 51 IC 113. Therefore, where there is no embarrassment and no legal grievance, sec 68 has no application. Thus a mortgagee decree holder purchased in auction his debtor's property and thereafter the debtor became an insolvent and a Receiver was appointed in respect of his property, the Receiver proceeded to sell the property purchased by the mortgagee in the auction sale, *held*, that the mortgagee was not a person aggrieved by the Receiver's act, as there was no legal grievance because the property in question being no longer the insolvent's property the intended sale by the Receiver could not possibly affect his title, *Hanseshur v Rakhal Das* 18 C W N, 366 18 C L J 359 20 IC 683. Where the claim of a person as a creditor is disallowed by the Official Receiver such person is an aggrieved person and can appeal to Court against the Receiver's act, *Kumaraswamy Nandar v Venkata Swamy Kounden* 19 L W 193 46 M L J 242 (1924) M W N 212 78 IC 857. An insolvent will have a right of appeal hereunder if he is aggrieved by an act or decision of the Receiver. But as to when he cannot be said to be aggrieved see *Sakhuat Ali v Radha Mohan* *infra*. A decision by the

Appeal by the Insolvent

Official Receiver that a certain debt is due by the insolvent is appealable under this section as such a decision would aggrieve the insolvent. *Anandji Damodar v James Finlay & Co* 15 S L R 28 61 IC 441. A decision can be open to attack under this section only when it affects the right claimed and does not merely impede the person (seeking to attack it) in his assertion of the right. *Munjuluri Si aramiah v Singumahanu Bhujanga Rao* (1917) M W N, 75 20 M L T 486, 5 L W 255 3, IC 773.

The real test for ascertaining whether a person has suffered a legal grievance or not is to see whether the decision has wrongfully refused him something which he had a right to demand. *Ex parte Official Receiver Re Reed Bowen and Co* (1887) 10 Q B D 174 (177-178), see also *In re Lamb Ex parte the Board of Trade* (1894) 2 Q B D, 805, *Kelaki Chanran v Sarat Kumari* 20 C W N 995. For

Appeal by creditor

instance, a creditor has the right to demand that the sale proclamation issued by the Receiver should represent the correct state of things and if the Receiver ignores this right, the creditor will suffer a

legal grievance and will have his remedy under this section, *Tiruvenkatachattar v Thangayammal*, 39 Mad, 479 17 M L T 432 29 I C 294 But a creditor has no *locus standi* to intervene in a proceeding by a stranger against the estate in the Receiver's hand and therefore the Receiver's acts or decisions in that proceeding cannot aggrieve him, *Jhabba Lal v Shib Chunder*, 39 All 152 15 A L J 1 37 I C 76 When a person applies to the Receiver claiming that a certain property put up for sale as belonging to the insolvent is really his own property and therefore not liable to be sold he becomes an aggrieved person if notwithstanding his application the Receiver sells the property, *Allagappa Chettiar v Naganatha* 3, M L J, 612 47 I C 789 22 M L T 371 6 L W 145 (1917) M W N 6-7 Such an aggrieved third party claimant if the sale by the Receiver has yet to take place, can apply under this section to the Court for an order preventing the sale It is for the Court and not for the Receiver, to adjudicate upon such claim, and the Court's decision upon the claim will be one under sec 4 *Iellayappa Chettiar v Ramanathan* 46 M L J 80 19 L W 251 *Idc* also the notes and cases at pp 40 41 *ante* Similarly where a Receiver took possession of the property of a third party believing it to be the insolvent's the dispossessed owner became an aggrieved party entitled to proceed under this section (and not under O XXI r 58 of the Civil Procedure Code) *Mulchand v Murari Lal*, 36 All 8 11 A L J 9-9 21 I C 702 See also *Charu Chandra v Hem Chandra Mookherji* 47 I C 62 (Cal) *Thakur Prosad v Punno Lal* 35 All 410 11 A L J 603 20 I C 673 Cf *Nagoba v Zinjarde* 26 N L R 46 A I R 1929 Nag 338 But where it is the insolvent that complains of the sale by the receiver he will not become an aggrieved person if the Receiver disallows his objection for this simple reason that he cannot be prejudiced by a sale of the property in which he has no interest *Salhaat Ali v Radha Mohan* 41 All 243 17 A L J 299 40 I C 816 See also *Hari Rao v Official Assignee*, 49 Mad 461 (1906) M W N 364 50 M L J 358 23 I W 599 A I R 1926 Mad 556 94 I C 642 (F B) For a somewhat similar reason it has been held that where a sale by an insolvent Mitakshara father (including the son's interests) is annulled by the Court and the sons take exception to the disposal of the property by the Receiver the sons will have no *locus standi* to make an application here under against the Receiver's act *Pandurajamma v Marudugila* A I R 1927 Mad 232 98 I C 1065 Similarly where a person has no *locus standi* to make an application he cannot be an aggrieved person if the application is rejected on that ground *Jhalla Lal v Shib Chander* 30 All 152 15 A L J 1 1- I C 76 But according to the Allahabad High Court this does not mean that the remedy herein provided—though proper—is the,

sole remedy, that is to say, an aggrieved third party is not always bound to confine himself to this section alone, but he may follow other remedies as well, *Hasmat Bibi v Bhagwati Das*, 36 All, 65 12 A L J, 24 This section does not deprive a person, claiming adversely against the insolvent, of his ordinary remedy by way of suit for the property taken away from him by the Receiver under section 28. The mere granting of one form of remedy cannot be regarded as taking away another, *Basodi v Mahanand*, 13 N L R 210 42 IC 799, also see *Raman Chetty v A V P Firm*, 31 IC 884. Vide also the notes and cases under the heading "Remedy of the aggrieved person," below. So where the Receiver wrongfully seizes the property of a stranger to the insolvency proceeding, the latter has two remedies open to him, he can proceed under this section, or if he pleases he can altogether ignore the Insolvency Court and sue in a Civil Court for a return of his property in an ordinary action against a trespasser, *Pila Ram v Jyoti Singh*, 29 All, 676 43 IC 57, 37 IC 708, and for maintaining such a suit against the Receiver previous leave of the Insolvency Court may not be necessary, because "it is always dangerous for Indian Courts to apply English Common Law rule of procedure unless such rule has been expressly adopted," *Halima v Mathradas*, 10 S L R 179 40 IC 122, see also *Irshad Hussain v Gopinath* 41 All, 378. If, however he chooses to avail himself of the remedy provided by this section and his application is dismissed on the merits he cannot begin again and raise the same issue in a suit in a Civil Court, inasmuch as an application under this section is a "suit" within the meaning of sec 11 of the C P Code, and a decision on such an application constitutes *res judicata*, (*Ibid*), also *Ram Kirpal v Rup Kuan* 11 I A 37 6 All, 209. But a somewhat inconsistent view seems to have been taken in *Mohri v Baijnath* 40 All 587 16 A L J 456 46 IC 304. Cf also *Jhunkulal v Piarilal* 9 All 234 15 A L J 42 38 IC 61. But this latter view can no longer be supported in view of Sec 4 (2) *ante* see pp 34, 35. It may here incidentally be pointed out that a claim consequent upon seizure of property by Receiver, should not be confounded with a claim under O XXI, r 28 of the C P C because the Receiver seizes the property as its legal owner and his act is not a mere *sequestration* of the property pending sale so as to preclude dealing therewith. Cf 95 IC 940 (All). When the application is not made within 21 days as herein provided, it will not amount to pursuing a remedy hereunder and will not form any bar to a fresh suit *Kundan Lal v Khem Chand*, 44 All, 67 A I R 1922 All 407 70 IC 07.

When the insolvent or the creditor wants to appeal against the Receiver, the same test will be applied, that is to say, there

must be some legal grievance to sustain the appeal. This is so because the expression "is aggrieved" equally governs all of them.

Remedy of the aggrieved person The remedy consists of an appeal to the Court which appointed the Receiver. This is in accordance with the view expressed in some of the early cases that the party feeling aggrieved by the conduct of the Receiver should seek redress against him in the very proceedings in which he was appointed, *Kamatchi v Sundaram*, 26 Mad, 492, *Pramatha v Khettra* 32 Cal, 270 9 C W N 247. The use of the words "may" lends support to the view that the remedy herein provided is not the aggrieved person's sole remedy, *vide supra*, see also *Hasmat Bibi v Bhagwan Das*, 36 All, 65 12 A L J 24. The word "may" in this section does not mean "must", *Maharana Kunwar v*

David 46 All 16 21 A L J 737
A I R 1924 All 40 77 I C 57. The

section not providing the only remedy, an aggrieved person can either have recourse to the speedy remedy prescribed herein or pursue his ordinary remedy in the Civil Court, *Ibid*. A stranger to insolvency proceedings if aggrieved by an act of the Receiver may seek redress in a regular suit or he can proceed under this section, *Husaini v Muhammad Zamur* 26 O C 319 A I R 1924 Oudh, 294 74 I C 802, *Misri Lal v Kanhaiya Lal* L R 3 A 285 A I R 1922 All 128 66 I C 863, it is open to a third person who does not claim title through the insolvent to treat the Receiver as a trespasser and maintain his claim in a Civil Court, *Maharana Kunwar v David supra*. Where a certain property was advertised by the Receiver to be sold as that of the insolvent, and a person, who had taken a transfer from the insolvent before the insolvency, applied to the Court under this section for an order to set aside the proposed sale but the application was dismissed as made after 21 days the transferee cannot be said to have pursued a remedy under this section and hence a suit by him against the Receiver is not barred, *Kundanlal v Khemchandra* 44 All 620 A I R 1922 All 40 70 I C 9. But see *Menahim v Solomon*, 4 Bom 548 A I R 1923 Bom 225 25 Bom L R 155 in which it has been held that where the Receiver makes an order against the insolvent's debtors the aggrieved party can proceed under this section but cannot file a suit. From what has been said above it follows that a person aggrieved

Election of Remedies by the Receiver's act or conduct has the right to make an election between his remedies. If he does not elect to pursue his remedy under this section there is no determination of the controversy and he will be within his rights in seeking his remedy by a regular suit, *Kundan Lal v Khemchand supra*. Cf 71 I C 802. But

once the aggrieved person *elects* to get his remedy from the Insolvency Court and avails himself of the provisions of this section, he will be precluded from following his other remedy viz that in the ordinary Civil Court, *Irshad Hussain v Gopinath* 41 All, 378 17 A L J 374 49 I C 590, *Husain v Muhammad Zamir, supra*. A stranger to insolvency proceedings may at his *option* seek his redress in the ordinary Civil Court when aggrieved by an act of the Receiver or he may apply under this section, but if he takes the latter course, he must comply with the terms of the section, *Bhairo Pershad v S P C Das*, 1

A L J 787 51 I C 113. It is an elementary principle of law that where a litigant voluntarily *elects* to submit to the decision of one out of two alterna-

tive courses which are open to him, he cannot turn round after an *adverse* decision against him and litigate the same matter again, *Pitaram v Jujhar Singh*, 15 A L J 661 33 I C 798. This follows from the doctrine of finality enunciated in *Ram Kirpal Shukul v Rup Kuar*, 11 I A 37 6 All, 269, *G H Hook v Administrator General*, 48 Cal, 499 25 C W N 615 33 C L J 405, P C. Cf *Panja Ram v Gurraju, infra*. Under sec 4 of the present Act, any question of title, priority etc can be decided by the Insolvency Court, and if the Court, being invited under this section decides any of those questions its decision will be final and binding as *res*

Res judicata

judicata, *Pitaram v Jujhar Singh* 6 All, 626 43 I C 573. Cf *Blairo Pershad v S P C Das supra* *Barra Begum v Sheonarain* AIR 1923 All 293. But the decisions of our Courts are not uniform in this respect. Thus, in *Raman Chetty v A V P Irm* 31 I C 884 (*supra*) it has been held that an order under this section does not preclude a party from pursuing an ordinary civil remedy. So, likewise, it has been

Conflict of opinion on the question of *res judicata* when claim is preferred to property seized by Receiver

said that where an Insolvency Court disallows a claim to a property attached and sold as the insolvent's property the unsuccessful claimant can establish his title by a regular suit, *Harman v Ganpat*, 5 L L J 9 AIR 1923 Lah 224 73 I C 367, cited at p 41, *ante*, *Duni Chand v Muhammad Hussain* 22 P R 1917 14 P W R 1917 40 I C 220. In *Sanchi Khan v Karam Chand*, AIR 1923 Lah 150 73 I C 705, it has been pointed out that so far as the Lahore High Court is concerned, the matter is concluded by the authority of *Duni Chand's* case and where a person's claim to the property taken possession of by the Receiver is disallowed such person has a remedy in a regular suit to establish his rights. *Vide* also the notes and cases at pp 40 41, *ante*. In an Allahabad case (decided

before this Act of 1920), it was held that where on an attachment of the insolvent's property by the Receiver, two rival claimants, adversely to each other, contested the validity of the attachment and the Insolvency Court decided in favour of one of them, a regular suit by the other to establish his title was maintainable, the principle of *res judicata* not applying owing to the Insolvency Court's want of power to adjudicate upon a question of title, *Hukumat Rai v Padam Narain*, 39 All, 333 15 A L J 188 38 I C 151. But this case will now stand superseded by sec 4, the effect of which will be to conclude the matter if there has been an adjudication within the meaning of that section [see *Desrao v Vihai*, A I R 1925 Nag 363 87 I C 1000, cited at p 40, *ante*]. Where an aggrieved party has

Unless there is a regular adjudication under this section recourse to ordinary suit will not be barred

made no attempt to bring the matter up before the Insolvency Court, which has in consequence, given no decision under sec 4, recourse to ordinary Civil Court will not be barred, *Maharana Kunwar v David*, 46 All, 16 & (*supra*), also see

Kundanlal v Khem Chandra 44 All 620 (cited at p 427). Though the right of separate suit may not be barred, yet where a person fails to appeal when he could appeal, it is no longer open to him to raise the question at a subsequent stage of the insolvency proceeding, see *Panja Ram v Gurraju*, 18 L W 282 A I R 1924 Mad 147 70 I C 87. Cf *Halima v Mathradas* cited at p 426, *ante*. In a case falling under sec 53, 54 or 54A, if the Receiver refuses to take action, the creditor can, besides following his remedy hereunder, seek his special remedy in accordance with the provisions of section 54 A. Cf 47 Mad, 673, cited at p 360, *ante*.

As to the **Procedure** for an appeal against the Receiver, *vide infra*. The **Limitation** for the appeal is 21 days (under the *proviso*, below) from the date of the act or decision complained of.

Though there is no right of appeal under this section unless some legal grievance is occasioned by an act of the Receiver, it should not be supposed that there is no remedy against an inequitable act of the Receiver. The receiver is an officer of the Court and if he acts in excess of his authority it is competent even to a stranger to bring that fact to the notice of the Court which has inherent power to review the conduct of the Receiver and to make an appropriate order in order to prevent the molestation of a stranger by its own officer *Hanseshur v Rakhal Das* 18 C L J 359 (361) 18 C W N 366 (368). The Court has powers of supervision over the Receiver and can give him suitable directions as to how to act in respect of a certain matter, *Janashu v Muthu Karuppan* - 1 W 106 14 M L J 119 (1015) M W N 345 44 I C 515.

once the aggrieved person *elects* to get his remedy from the Insolvency Court and avails himself of the provisions of this section, he will be precluded from following his other remedy viz that in the ordinary Civil Court, *Irshad Hussain v Gopinath* 41 All, 378 17 A L J 374 49 IC 590, *Husain v Muhammad Zamir, supra*. A stranger to insolvency proceedings may at his *option* seek his redress in the ordinary Civil Court when aggrieved by an act of the Receiver or he may apply under this section, but if he takes the latter course, he must comply with the terms of the section *Bhairo Pershad v S P C Das* 1

The doctrine of finality

ALJ 787 51 IC 113. It is an elementary principle of law that where a litigant voluntarily *elects* to submit to the decision of one out of two alternative courses which are open to him he cannot turn round after an *adverse* decision against him and litigate the same matter again *Pitaram v Jujhar Singh*, 15 A L J 661 33 IC 48. This follows from the doctrine of finality enunciated in *Ram Kirpal Shukul v Rup Kuan* 11 IA 37 6 All, 269, *G H Hook v Administrator General* 48 Cal, 499 25 CWN 915 33 CLJ 405, PC. Cf *Panja Ram v Gurraju, infra*. Under sec 4 of the present Act any question of title, priority etc can be decided by the Insolvency Court, and if the Court being invited under this section decides any of those questions its

Res judicata

decision will be *final* and binding as *res judicata* *Pitaram v Jujhar Singh* 9 All, 626 43 IC 573. Cf *Bhairo Pershad v S P C Das supra* *Barra Begum v Sheonarsingh* AIR 1923 All 293. But the decisions of our Courts are not uniform in this respect. Thus, in *Raman Chetty v A I P Firm* 31 IC 884 (*supra*) it has been held that an order under this section does not preclude a party from pursuing an ordinary civil remedy. So, likewise, it has been

Conflict of opinion on the question of *res judicata* when claim is preferred to property seized by Receiver

said that where an Insolvency Court does allow a claim to a property attached and sold as the insolvent's property the unsuccessful claimant can establish his title by a regular suit *Harman v Ganpal* 5 L L J 9 AIR 1923 Lah 724 73 IC 367 cited at p 41, ante. *Duni Chand v Muhammad Hussain* 22 PR 1917 14 PWR 1917 40 IC 220. In *Sanchi Khan v Karam Chand*, AIR 1923 Lah 150 73 IC 45 it has been pointed out that so far as the Lahore High Court is concerned the matter is concluded by the authority of *Duni Chand's* case and where a person's claim to the property taken possession of by the Receiver is disallowed such person has a remedy in a regular suit to establish his rights. Vide also the notes and cases at pp 40 41, ante. In an Allahabad case (decided

before this Act of 1920), it was held that where on an attachment of the insolvent's property by the Receiver, two rival claimants adversely to each other, contested the validity of the attachment and the Insolvency Court decided in favour of one of them, a regular suit by the other to establish his title was maintainable, the principle of *res judicata* not applying owing to the Insolvency Court's want of power to adjudicate upon a question of title, *Hukumat Rai v Padam Narain* 39 All , 333 15 A L J 188 38 I C 151 But this case will now stand superseded by sec 4, the effect of which will be to conclude the matter if there has been an adjudication within the meaning of that section [see *Desrao v Vihai* A I R 1925 Nag 363 87 I C 1000, cited at p 40 ante] Where an aggrieved party has

Unless there is a regular adjudication under this section recourse to ordinary suit will not be barred made no attempt to bring the matter up before the Insolvency Court which has in consequence, given no decision under sec 4 recourse to ordinary Civil Court will not be barred *Maharana Kunwar v David*, 46 All 16 & (*supra*), also see

Kundanlal v Khem Chandra 44 All 620 (cited at p 427) Though the right of separate suit may not be barred yet where a person fails to appeal when he could appeal it is no longer open to him to raise the question at a subsequent stage of the insolvency proceeding see *Panja Ram v Gurraju*, 18 L W 282 A I R 1924 Mad 14 6 I C 8 Cf *Halima v Mathradas* cited at p 426 ante In a case falling under sec 53 54 or 54A, if the Receiver refuses to take action the creditor can, besides following his remedy hereunder seek his special remedy in accordance with the provisions of section 54 A Cf 47 Mad 673 cited at p 360 ante

As to the **Procedure** for an appeal against the Receiver, *vide infra* The **Limitation** for the appeal is 21 days (under the *proviso*, below) from the date of the act or decision complained of

Though there is no right of appeal under this section unless some legal grievance is occasioned by an act of the Receiver, it should not be supposed that there is no remedy against an inequitable act of the Receiver The receiver is an officer of the Court and if he acts in excess of his authority it is competent even to a stranger to bring that fact to the notice of the Court, which has inherent power to review the conduct of the Receiver and to make an appropriate order in order to prevent the molestation of a stranger by its own officer *Hanseshur v Rakhil Das* 18 C L J 359 (361) 18 C W N 366 (368) The Court has powers of supervision over the Receiver and can give him suitable directions as to how to act in respect of a certain matter, *Janashir v Muthu Karuppan* I W 126 4 M I J 19 (1918) M W N 345 44 I C 515

Restoration of possession to person wrongly dispossessed by Receiver: We have seen at p 426, *ante* that a person wrongly dispossessed by the receiver can seek his redress under this section. In such a case the Court can interfere even under sec 4 and apart from this section. When a Court finds that its officer is in wrongful possession of property, such possession should be discontinued and restored to the proper person. It is not material that the person who had a right to possession failed to object at the time when the possession was given to the officer. *Nagoba v Zinjarde* 26 N L R 46 A I R 1919 Nag 338. If the Insolvency Court owing to a mistaken view of the law, fails to pass the necessary order of restoration an appeal may be taken. Such an appeal should not be dismissed because of delay in asking for restoration of possession. *Ibid*

Sale by Receiver when can be interfered with The Insolvency Court has no jurisdiction to set aside a sale held by the Receiver in the absence of proof of fraud or collusion or material irregularity or illegality in conducting the sale or misconduct on his part causing injury to the estate or where the Receiver does not act beyond his authority far in excess of the powers conferred upon him. *Maung Tha Dun v Po Ka* 5 Rang 768 A I R 1928 Rang 60 10- IC

Court's power to interfere with sale by Official Receiver

172 The Court's power to interfere with a sale by the Receiver is not limited to cases where there has been some *malafides* on the part of the Receiver or purchaser where the action of the Receiver is *irregular and prejudicial* to the general interests of creditors, the Court can set aside the Receiver's order.

77 " *Sammal*, 39 Mad, 479 (483) 20 29 IC 294, *Ramabhadra v* 54 17 L W 622 A I R 1915 case of *Ex parte Lloyd Re*

position. A sale of the insolvent's property without giving notice to the intending bidders that there is a litigation pending regarding the property is liable to be set aside at the instance of the purchaser, necessitating refund of the purchase money. *Hem Chandra v Uma Sadhan* A I R 1927 Cal 834 103 IC 605

Objection against Receiver can be waived The effect

of such waiver is to bar the right of re-agitation over one's grievances. Where the insolvent raises an objection as to the receiver's competence to sell a particular property, and the receiver holds

Waiver estops party from re-agitating before Insolvency Court

the sale ignoring the objection, and no complaint is made to the Court against the Receiver the insolvent cannot thereafter

impeach the sale as invalid on that ground, *Ramachandra v Gurraju*, A I R 1924 Mad 147 18 L W 282 76 I C 977

Proceeding against the Receiver Note that the body of the section makes use of the words, "apply" and "application," whereas the head line and the marginal note give the word "appeal." The use of the words, "apply" and "application" is necessitated by the fact that even the Receiver's act can be complained of. All the above words distinctly show that the Legislature merely contemplated "a petition of appeal," and that this *petition* should ordinarily set forth both the facts complained of and the grounds of objection thereto. The section, however, does not require that *all* the grounds of objection challenging the receiver's act or decision should be stated in the petition. Such grounds may be supplemented or amplified later on. *Hemchandra v Uma Sadhan*, A I R 1927 Cal 834

103 I C 695 Proceeding against the Receiver is however an appeal in a very limited sense, *Thakur Prosad v Punno Lal*, 35 All, 410 11 A L J 603 20 I C 673, *Alla Pichai v Kuppar Pichai*, 40 Mad, 752 39 I C 429

The rule of this section that redress against the Receiver should be sought in the very proceeding in which he is appointed, does not preclude the institution of separate proceedings against him on suitable occasions (of course with or without the leave of the Court according to diversity of judicial opinions in the different provinces). Cf *Kamatchi v Sundaram Aiyar*, 26 Mad 492, *Promatha v Khetra* 37 Cal 270 9 C W N 247

The enquiry contemplated by this section need not be a lengthy one, as what the Court does under this section practically amounts to a mere reconsideration

Scope of the Enquiry of an executive act of one of its officers, *Raman Chetty v A V P Firm*, 31 I C 884, *supra*. In a proceeding under this section, the Court need not record fresh evidence but may proceed on the evidence recorded by the Receiver. *Kumaraswami Nadar v Venkataswami Koundan* 46 M L J 242 (1924) M W N 212 19 L W 10, A I R 1924 Mad 830 8 I C 857. As the Court is here concerned with the question of correctness of the order of the Receiver there can be no objection to his acting on the evidence given before that officer. *Ibid*. When an application under sec 68 is made it is the duty of the Court to entertain it and after hearing the evidence on both sides decide the issues raised. *Pitaram v Jujhar Singh* 30 All 626 43 I C 57. It should be remembered that the section provides a *speedy* though not the *only* remedy for a person wronged by the Receiver. *Maharana Kunwar v F B David* cited at p 423 also *vide* at p 426

When a contract of sale has been completed by the Receiver, the aggrieved creditor should start a proceeding under this section within 21 days of the sale and not under O XXI, r 90 of the C P Code. *Aranashi v Muthu Karuppan*, 7 L W 406 34 M L J 319 (1918) M W N 345 44 I C 885

Receiver not a necessary formal party It is not obligatory on the Court acting under this section to make the Receiver a formal party to the application, *Kumaraswami Nadar v Venkataswami Koundan*, 46 M L J 242 (1924) M W N 212 (*supra*) But the Receiver can appear and claim to be heard *Ibid*

Receiver, a proper party in the Regular Suit Where a person sues in a Civil Court for declaration of title to property which the Receiver proceeds against as belonging to the insolvent, the Receiver is a proper party, and can be impleaded without obtaining the permission of the Insolvency Court. *Maharana Kunuar v David*, 46 All, 16 21 A L J 737 A I R 1924 All 40 L R 4 A 483 Cf *Halima v Mathradas*, 10 S L R 179 40 I C 122 The presence of the ordinary legal representative of the insolvent on the record does not excuse an omission to get the receiver on the record, *Nainar Roulther v Pichai Roulther*, (1929) M W N 168 A I R 1929 Mad 600

Proceeding hereunder—if in the nature of a suit: An application under this section is in the nature of a suit, *Sitaram v Jhujhar Singh*, 15 A L J 661 33 I C 798, and the Receiver ought to be impleaded as a party, *Jhabba Lal v Shib Charan* 39 All, 152 15 A L J 1 37 I C 76, though he is not a necessary party *vide* 46 M L J 242 (*supra*) Cf *Mangulani v Singhu Mahantu* 39 Mad, 593 18 M L T 200 30 I C 703, and an adjudication by the Insolvency Court in such a proceeding will operate as *res judicata*, and bar a subsequent suit for the same relief in the Civil Court *Sitaram v Jhujhar Singh*, *supra*, *vide* also under the heading 'Remedy of the aggrieved person,' *supra*

Proviso : Limitation The limitation for an appeal under this section is 21 days from the date of the act or decision complained of Cf *Hem Chandra v Uma Sadhan*, A I R 1917 Cal 834 101 I C 695 *Chandra Vath v Nagendra Vath*, A I R 1928 Cal 263 107 I C 467 *Aranashi v Muthu Karuppan*, 7 L W 406 34 M L J 319 (1918) M W N 345 44 I C 885, *Maharana Kunuar v David*, 46 All, 16 21 M L J 737 A I R 1924 All, 40 (*supra*), Formerly, this period of limitation was strictly calculated and an appeal under sec 22 (now sec 68) was held not to fall within the scope of secs 5 and 12 of the Limitation Act, see *Thakur Prosad v Punnolal* 35 All, 410, *Duraisami v Meenakshi*, 16 M L T 246 25 I C 610,

Siaramiah v Bhujanga 39 Mad, 596 But the law has been changed in this respect, see sec 78, *infra* When the application is not under sec 68 but is made evoking the Court's inherent power of supervision, it is not subject to the limitation prescribed in the *pro iso Hanseshur v Rakhal*, 18 C L J 359 18 C W N 366 See also *Ramasami v Venkataswar* 42 Mad, 13 13 M L J 531 48 I C 952 A Court has inherent power to rectify the errors and mistakes of a Receiver or to reverse or modify his acts or decisions and the exercise of this inherent power is not subject to the time limit provided in the section, *Dataram v Deokinandan* 1 Lah 307 58 I C 6

Where the Receiver has no right to hold a sale which is invalid in consequence no question of limitation will arise for setting aside the sale *Ka ali Sankara Rao v Ramkrishnayya* 46 M L J 184 A I R 1924 Mad 461 (1924) M W N 198 34 M L T 201 Cf *Khaira v Salem Raj* 51 I C 935 (Lah) The 21 days' rule of limitation does not apply to the Court taking action under sec 50 () *Chadai Ramaswami v Venkateswara* 42 Mad 13 35 M L J 531 48 I C 592 An application out of time is regarded as one not made and therefore such an application cannot preclude the applicant from suing for a declaration in the ordinary Court *Kundan Lal v Khem Chandra* 44 All 670 A I R 1922 All 40 50 I C 97

Time limit for confirmation of Receiver's report

The District Judge has no jurisdiction to confirm the Receiver's report *except by consent* of parties until 21 days have elapsed from the date of the report and an aggrieved creditor can apply within that time for reversal or modification thereof *Gobinda Chandra v Haricharan* A I R 1926 Cal 826 94 I C 332

Appeal

An order of the District Judge under this section cannot be appealed against except with leave obtained under sec 75 (3) *Balli v Naid Lal* 33 I C 773 (All) Cf *Chandra Nath v Nagendra Nath* A I R 1928 Cal 63 107 I C 467—according to which such an order may fall under sec 4 and be appealable as such See also *Allapichai v Kuppari Pichai* 40 Mad 5 3 M L J 449 30 I C 420 in which it has been held that an appeal lies to the High Court against an order of the District Judge confirming an order of the Official Receiver dismissing an application for adjunction Cf *Hari Rao v Official Receiver* 40 Mad 461 (I B) cited at 115 *ante*

PART IV.

PENALTIES

69. [New] If a debtor, whether before or
after the making of an order of
adjudication,—
Offences by debtors

- (a) wilfully fails to perform the duties imposed on him by section 22 or to deliver up possession of any part of his property which is divisible among his creditors under this Act and which is for the time being in his possession or under his control to the Court or to any person authorised by the Court to take possession of it or
- (b) fraudulently with intent to conceal the state of his affairs or to defeat the objects of this Act,—
 - (i) has destroyed or otherwise wilfully prevented or purposely withheld the production of any document relating to such of his affairs as are subject to investigation under this Act or
 - (ii) has kept or caused to be kept false books or
 - (iii) has made false entries in or withheld entries from or wilfully altered or falsified any document relating to such of his affairs as are subject to investigation under this Act or
- (c) fraudulently with intent to diminish the sum to be divided among his creditors or to give an undue preference to any of his creditors —
 - (i) has discharged or concealed any debt due to or from him, or

provisions of the section are *quasi* penal, and therefore like all penal laws should be strictly construed, *Ibid*

In this section we have an enumeration of the acts that constitute offences within the meaning of the Insolvency Act, and for which the insolvent may be punished with imprisonment extending up to one year. These offences are, in their nature, *disciplinary*, that is to say, the offences committed by the insolvent during bankruptcy are in the

Nature of the offences nature of breaches of duty to the Court and not offences against the general criminal law *Laduram v Mahabir*, 39 All, 171 15 A L J 31 37 I C 996 *Palaniappa v Subramania*, 54 I C 740 38 M L J 338 (1920) M W N 135 One outstanding characteristic of all the offences is that there is an element of dishonesty or fraudulent attempt on the part of the insolvent to prejudice the interest of his creditors. Therefore, where this improper mental element is not present, there is no offence, *Comp R v Dyson* (1894) 2 Q B 176, *R v Page*, (1819) Russ & Ry 392 It should be noticed that the Ind Penal Code recognises certain offences relating to fraudulent disposition of property, see secs

This section does not preclude prosecution under I P C 421 424, I P C The effect of the special provisions of this Act is not to repeal the general provisions of the Penal Code See sec 26 of the General Clauses Act, also *Sigubala v Ramasamiah* 6

L W 283 42 I C 608 "A law of this kind, the intention of which is to punish *should be administered as criminal law is administered*" *Rashbehari v Bhagwan Chandra*, 17 Cal, 209 'In an Indian Court the seriousness of an insolvency offence is almost certain to be lightly estimated. Indeed there is but slender chance before the tribunals in India of a debtor receiving a really heavy sentence for a mere insolvency offence, e g for a fraudulent omission in his statement of affairs'—Civil Justice Committee Report, p 230

The acts enumerated in the section will render the insolvent punishable whether they are committed *before* or *after* the making of an order of adjudication. In this respect the section is peculiar. In England the penalties are confined to conduct *after* the presentation of the bankruptcy petition, but in this country, having regard to its peculiar conditions, the Legislature made them embrace acts whether *before* or *after* adjudication. The word "*before*" is sufficiently wide to cover almost any distance of time, but the definition of the *specific* acts complained of narrows down the generality of the provision so as to confine the offences strictly to matters affecting the investigation of the insolvent's affairs under the Act *Ganga Prasad v Madhuri Saran* 25 A L J 331 A I R 1927 All 352 100 I C 550 By Act VII

(11) has made away with, charged, mortgaged or concealed any part of his property of any kind whatsoever, he shall be punishable on conviction * * *¹ with imprisonment which may extend to one year

Object & Scope This section is practically *new* and has been substituted for the old section 43 (2). The words in clause (a) of this section are all new and those of clause (b) have been taken from sec 103 of the Presidency Towns Insolvency Act (Act III of 1909), so in construing this section reference may be made to the cases decided under that section, see *Joseph Perry v Official Assignee* *infra*. The present section differs from the old section 43 far more in form than in substance. The changes introduced in the section have thus been explained in the Statement of Objects and Reasons — "Proceedings instituted against fraudulent insolvents are frequently infructuous. This is largely due to the lack of precision in the Act as to the procedure to be adopted by the Courts. The wording of the sub sec (2) of (old) sec 43 is unduly vague, regard being had to the fact that it constitutes a criminal offence and experience has shown that it frequently creates difficulties. It is proposed that the penal provisions of the existing section 43 should be amended on the lines of sec 103 of the Presidency Towns Insolvency Act, and that the procedure to be followed on a charge should be defined on the lines of sec 104 of that Act. It seems desirable to make it clear that a dishonest insolvent who has been guilty of an offence under the Act can be proceeded against even after he has obtained his discharge or after a composition submitted by him has been accepted." Cf Sec 71 below. The penalties defined in the section are conceived with reference to the peculiar conditions of Indian life and embrace acts '*before or after* adjudication.' In this respect this Act materially differs from the English Act under which the penalties are confined to conduct *after* presentation of the bankruptcy petition. *Ganga Prasad v Madhuri* 25 A L J 331 A I R 1927 All 352 100 I C 50. *Vide* also Sec 154 of the Eng Bankruptcy Act 1914 as amended by B A 1926. With reference to sec 103 of the Presidency Towns Insolvency Act, 1909 it has been held that that section applies to offences committed both *before* and *after* the adjudication and also applies to cases of wilfully withholding the production of books even after they have come to the possession of the Official Assignee see *Joseph Perry v Official Assignee*, 24 C W N 425 31 C L J 209 56 I C 778. The above principle seems to hold good also in cases under this Act. The

¹The words 'by the Court' have been omitted by Act XII of 197

provisions of the section are *quasi* penal, and therefore like all penal laws should be strictly construed, *Ibid*

In this section we have an enumeration of the acts that constitute offences within the meaning of the Insolvency Act, and for which the insolvent may be punished with imprisonment

Nature of the offences extending up to one year These offences are, in their nature, *disciplinary*, that is to say, the offences committed by the insolvent during bankruptcy are in the nature of breaches of duty to the Court and not offences against the general criminal law, *Laduram v Mahabir*, 39 All, 171 15 A L J 31 37 I C 996, *Palaniappa v Subramania*, 54 I C 740 38 M L J 338 (1920) M W N 135 One outstanding characteristic of all the offences is that there is an element of dishonesty or fraudulent attempt on the part of the insolvent to prejudice the interest of his creditors Therefore, where this improper mental element is not present, there is no offence, *Comp R v Dyson* (1894) 2 Q B 176, *R v Page*, (1819) Russ & Ry 392 It should be noticed that the Ind Penal Code recognises certain offences relating to fraudulent disposition of property, see secs

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of 1927 the words "by the Court" have been omitted, [*vide* the Footnote at p 435, *ante*] inasmuch as they became unnecessary after the amendment of sec 70 by Act IX of 1926 For the meaning of the term "Court" prior thereto, see *Digendra Chandra v Ramani Mohan* 22 C W N 958 48 I C 333 The Court is not bound to defer punishment in respect of acts and omissions

in the section until the insolvent applies for his discharge, *Rambehari v Jagannath*, 37 I C 638 19 O C 89 18 Cr

L J 270 We have seen at pp 142-43, *ante* (see the cases quoted there) that the questions regarding the insolvent's *misconduct* and *bad faith* cannot weigh with the Court at the time of making an order of adjudication, but this view should not lead one to suppose that the Court cannot go into all these questions except at the final stage when the insolvent applies for discharge Cf *Lucas v Official Assignee*, 24 C W N 418 The scope of this section is quite different from that of sec 24 or 25 of the Act, and the Court is quite competent to take cognisance of an act of bad faith on the part of the insolvent at any time whether *before* or *after* the order of adjudication under this section, although it may have no power to refuse to adjudge the debtor an insolvent merely on the ground of bad faith *Nanhi Mal v Lmp*, 17 O C 138 25 I C 363 The Court can be put in motion *at any time* under this section and then it is bound to consider whether the insolvent is guilty of any acts of *bad faith* mentioned herein It is not necessary that the Court should wait till the debtor makes an application for discharge *Utkobin v District Court* 49 I C 55 3 U B R (1918) 97 An insolvent committing an act of bad faith can either be dealt with under this section or may be refused a discharge *M Bu v Nga Po Saung*, 1 U B R (1911) 84 11 I C 743 It should be noticed that this section uses the word 'debtor' whereas the next section (sec 70) uses the word 'insolvent' This difference in the phraseology seems to have been designedly adopted to emphasise the fact that though the offence may be committed prior to adjudication, yet a prosecution can take place only *after* adjudication The criminal liability of an insolvent subsists after his discharge or after acceptance or approval of a composition *vide* sec 71 *infra*

Clause (a) Contemplates two acts only (i) Wilful non performance of the duties mentioned in section 22 (ii) Wilful non delivery of his property (if in his possession or control) to the Court or to the Receiver In order to constitute an offence the non performance of the duties or the non delivery of his property must be *wilful* Perhaps, it is not *wilful* when done under legal advice *R v Page* (1819) Russ & Ry 92 Before taking action against an insolvent for his continuance the Court should afford the insolvent all possible facilities to explain his condi-

Sukhlal v Official Assignee, Calcutta, 34 C L J 351 For the obligation of the insolvent to submit to examination, see secs 22 and 59A, also 13 Bom, 114, 32 Bom 198 and 33 Bom 46, cited at p 129, *ante* "Delivery of possession" in this clause must mean *such delivery* as will enable the Court or the Receiver to get hold of the property and to utilise it for the purpose of distributing the assets. The delivery must be only in respect of such properties as are *divisible* among the creditors under this Act otherwise failure to deliver will not render the insolvent punishable. As to what property is so divisible see sec 28 *ante*. Money in deposit in a Railway fund is not so *divisible* see 24 C W N 288, at p 198, *ante*. Therefore, dealing with such money is not punishable under this clause, *Nagindas v Ghelabai*, 44 Bom, 673, 22 Bom L R 322, 56 I C 450, cited at p 198 *ante*. The same thing may be predicated in respect of property held in trust, political pensions, agricultural holdings and so forth.

Clause (b) The acts mentioned in sub-clauses (i), (ii) and (iii) of this clause are offences only when they are committed fraudulently with intent to conceal the state of his affairs or to defeat the objects of this Act.

The first act penalised under this clause is the destruction of or preventing or withholding the production of, any document relating to the insolvent's affairs. Of course, in case of a charge on this score, the prosecution must prove the existence of the document, see *Lucas v Official Assignee, Bengal*, 24 C W N 418, 56 I C 577. The next one is the keeping of false books. Then is the making of false entries in the document relating to the insolvent estate. It is difficult to say if in sub-clause (a) there is a difference between the two words, "wilfully" and "purposely". The word "purposely" indicates that there should be a *definite motive* working behind the act. An act may be wilful but not inspired by any motive. It seems that as all the acts referred to in this clause (b) are subject to a question of fraudulent intent, the words "wilfully" and "purposely" are redundant. However, as in interpreting the words of a section we cannot render any word unnecessary we must put some meaning on these words. "Concealment, destruction, mutilation or falsification of any book or document relating to his affairs or being privy thereto by the debtor is an offence under this section unless it is proved that the insolvent had no intent to conceal the state of his affairs or to defeat the law", *Reg v Beck*, (1889) 6 Cox C C 718.

"False entries" must be made fraudulently with intent to conceal the state of the insolvent's affairs, see *Sukrit Narain v Raghunath*, 7 All, 445, *Karim Baksh v Mistry*, 7 All, 295. *Lona fide* mistakes and intentional inaccuracies do not fall within

the scope of this clause, *Ibid* Badly keeping of account books, if not prompted by a motive to defeat the provisions of the bankruptcy law, though it disentitles the insolvent to an absolute order of discharge, will not be an offence under this section, *Ganga Prasad v Madhuri Saran*, 25 A L J 331 A I R 1927 All , 352 100 I C 550

The omission to mention a property in an insolvency application may be fraudulent, *Nga Chok v Mg Pwa* 2 U B R (1914) 1 24 I C 767 In order to make an act criminal under this section there should always be a guilty intention, so, where an insolvent, not knowing or forgetting that an equity of redemption is a valuable asset failed to show in his schedule of assets certain lands remaining with his usufructuary mortgagee, he was held not to be guilty under this section, *Wadhawa Singh v Emperor*, 2 P W R 1918 Cr 158 P L R 1917 19 Cr L J 272 44 I C 128

Clause (c) Under this clause the following acts are criminal if done fraudulently with intent to diminish the amount divisible among the creditors or with intent to give an undue preference to any creditor 112

- (i) Discharging or concealing any debt due to or from him
- (ii) Removing, charging or mortgaging or concealing his property

It will be seen that the Penal Code recognises certain offences somewhat similar to the above, see secs 421 424, I P C But from this fact it is not to be supposed that the said sections of the Penal Code have, in any way, been affected by this sec 69 When a special enactment deals with an offence similar to an offence dealt with by the general enactment the provisions of the general enactment are repealed to that extent see sec 26 of the General Clauses Act Notwithstanding the provisions of this Act an insolvent's liability for punishment under the general criminal law remains, *Sigu Bahiah v Rama Samiah* 42 I C 608 Removing the goods from the shop with a view to taking it out of the reach of the creditors in anticipation of an approaching bankruptcy will constitute an offence hereunder, *Ganga Prasad v Madhuri Saran*, 25 A L J 331 A I R 1927 All 352 100 I C 550 A man may be guilty under cl (c) (22) though he has not actively concealed his property, when he knows where or in what manner his property has been disposed of by another with his connivance, *Quasim Ali v Emperor* 43 All 407 19 A L J 378 64 I C 37 22 Cr L J 725 In order to constitute an offence under this clause the preference should be towards a

creditor and not an "alleged" creditor, *Lucas v Official Assignee*, 24 C W N 418 56 I C 577 Payment of valuable consideration ordinarily will negative a suggestion of want of good faith, *Ibid*

Punishment The commission of the offences mentioned in this section renders the insolvent liable to punishment with imprisonment, extending to one year This section does not specifically mention whether the imprisonment should be simple or rigorous It seems that both kinds of imprisonment are contemplated by the Legislature Upon conviction the insolvent is to be lodged in the ordinary criminal jail as contrasted with the civil jail contemplated in sec 55 of the C P Code therefore no money need be deposited for his subsistence

The section does not say who is to initiate a proceeding under this section It seems that a Court is competent to take action under this section at the instance of a creditor, Cf *Kadir Baksh v Bhawan Prasad*, 14 All, 145 The Receiver may ask for prosecution of the insolvent Where the Court (before 1927) gave permission to the Receiver to prosecute the insolvent, such permission did not amount to a sanction to prosecute under sec 195 or to an order under sec 476 of the Cr P Code, *Sigu Bala v Ramasamiah*, 6 L W 283 47 I C 608, Cf sec 70

On conviction There should be a regular trial for the offences The insolvent should be found guilty of the offence he is charged with and there should be a formal conviction He should be given to know beforehand the specific charges against him and must be allowed to meet them if possible *Rashbehari v Bhagwan* 17 Cal, 209 Cf *Hunhar v Maheswar* 18 C W N 092, *Amiruddi Karikar v Jadab Karikar* 19 C L J 45 19 I C 920 (referring to 27 Bom, 599) In order to sustain a conviction, the charge against the insolvent should be proved beyond the shadow of a doubt, *1st K. Irm v Shaik Jooman* 5 Rang 50 A I R 1927 Rang 26 101 I C 419 When the Court is satisfied that there is ground for inquiring into any offence mentioned in this section and appearing to have been committed by the insolvent, the Court may record a finding to that effect and make a commitment of the offence in writing to a first class Magistrate having jurisdiction *ide* sec 70 *post* Under the repealed section 70 (4), the Insolvency Court itself could try the offence, but that is not possible under the present section 70 Now trial for a bankruptcy offence will purely be a criminal trial in accordance with the provisions of the Criminal Procedure Code 1898, *ide* sec 70, *post* It seems that a case hereunder will be a warrant case, comp, *Emperor v Girish Ch*, 50 Cal 285

How the Court is to be moved under the Section :

The section is silent as to who is to move the Court to take action under this section. Sec 70 only requires that the Court has to be satisfied of the existence of a *prima facie* ground for proceeding against the insolvent. The Court may be so satisfied on perusal of the records and may proceed *suo motu*. *Ide* notes under the heading "Is satisfied" at p 444 *infra*. The Court may be moved also on an application of the Receiver. Cf *Bhagwant Kishore v Sanwal Das* 19 A L J 701 61 IC 80. *Monmohan v Hemanta* 23 C L J 553. A creditor as well can move the Court to take action under this section, *Karuthan Chettiar v Raman Chetty* 45 M L J 804 18 L W 83, (1923) M W N 838 9 IC 340. A stranger to the Insolvency proceedings seems to have no right to move the Court hereunder. *Ide* also the cases and notes under the heading 'Who can take action' at p 445 *post*.

Appeal. Before the amendment of sec 70 by Act IX of 1926 the Insolvency Court could itself try an insolvency offence and then an appeal would lie to the High Court from an order of conviction and sentence made by the District Court. *Ide* the repealed last item in Sch I. But under the new sec 70 the Insolvency Court cannot hold a criminal trial with the result that the said last item in Sch I became infructuous and has in consequence been omitted. A trial for a bankruptcy offence being now a trial under the Cr P Code, an appeal from a sentence therefor will now be governed by sec 408 of the Cr P Code. A matter not open to appeal will be subject to revision under Ch XXXII Cr P C (and not under sec 115 of the C P Code as before). Formerly that is before the amendment considerable controversy centred round the question who was or was not aggrieved by an order of the District Court exercising criminal jurisdiction so as to be entitled under sec 75 to prefer an appeal from an order under secs 69 and 70. Cf *Bhagwant Kishore v Sanwal Das* 19 A L J 701 61 IC 802. *Kappa v Manicka Asari* 40 Mad 330. *Digeidra v Iamani* 22 C W N 958 48 IC 33. *Karuthan Chettiar v Raman Chetty* 9 IC 340. *Palianappa v Suliamanam* (1901) M W N 15 54 IC 40. *Irchand v Bilakidas* 55 IC 67. *Laduram Mahabir* 30 All 111.

IC 996 but now the point has lost all interest for us. Likewise the much debated point as to whether an appeal from a sentence of the Insolvency Court was a civil or a criminal appeal has also now been set at rest. For the old cases regard ing this matter see *Pesh Ghulam v Emperor* IC 129 (*Peswar*). *Chirunji Lal v Emperor* 6 All 56 12 A L J 1105 25 IC 986 (F B). *Vagindas v Ghelabhai* 44 Bom 113 25 IC 986 (F B). *Nasab v Topan Rani* 145 P I R 1916 63 P W R 1916 5 IC 404 *contra*.

Amiruddi Karikar v Jadab Karikar, 19 C.L.J. 430 19 IC 920 Now that an appeal from a sentence for a bankruptcy offence cannot be a civil appeal, the effect would be that the provisions of O. XLI, C. P. Code, which formerly used to be applied to such appeals cannot have any more application, Cf *Nagindas Bhukandas v Ghelabai*, 44 Bom., 673 23 Bom. L.R. 322 56 IC 449 Vide also under sec 70, under the heading "Appeal"

70. [New]. Where the Court is satisfied after such preliminary inquiry under section 69 if any, as it thinks necessary that there is ground for inquiring into any offence referred to in section 69 and appearing to have been committed by the insolvent, the Court may record a finding to that effect and make a complaint of the offence in writing to a Magistrate of the first class having jurisdiction, and such Magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure, 1898*

70. [Old], (1) Where the Court is satisfied that there is ground for inquiring into any offence referred to in section 69, the Court shall direct that a notice be served on the debtor in the manner prescribed in the Code of Criminal Procedure, 1898, for service of summons, calling on him to show cause why a charge or charges should not be framed against him

(2) The notice shall set forth the substance of the offence and any number of offences may be set forth in the same notice

(3) At the hearing of such notice and of any charge framed in pursuance thereof, the Court shall, so far as may be, follow the procedure for the trial of warrant cases by Magistrates prescribed by Chapter XXI of the Code of Criminal Procedure, 1898, and nothing in Chapter XVIII of the said Code relating to trials before High Courts and Courts of Session shall be applicable to such trial

* Substituted for sec 70 by the Insolvency (Amendment) Act, 1927 (X of 1927) and the Repealing and Amending Act, 1927 (X of 1927) received the assent of the Governor-General on the 17th April 1927. By the Act of 1926 only the first three sub-sections were omitted and sub-secs (1) and (2) were inadvertently left alone but subsequently this defect was discovered and sub-secs (1) and (2) were omitted by the Amendment Act of 1927. See 27 C.L.J. 250 at p 1.

(4) Any number of offences under this section may be charged at the same time

Provided that no debtor shall be sentenced to imprisonment exceeding an aggregate period of two years for offences under this section committed in the course of the same insolvency proceeding

(5) The Court may, instead of itself inquiring into an offence under section 69 make a complaint thereof in writing to the nearest Magistrate of the first class having jurisdiction, and such Magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure 1898

Provided that it shall not be necessary to examine the complainant

N B The section lays down the procedure the Court is to follow in trying any of the offences mentioned in the previous section (sec 69)

Amendment of 1926 The present section has been substituted for the old one by Act IX of 1926 on the recommendations of the Civil Justice Committee. The effect of this change is mainly two fold (1) Formerly the Insolvency Court had the alternative of either itself trying the offences specified in sec 69 or instead of itself enquiring into the offence of making a complaint in writing to the nearest first class Magistrate, *Virjilal Virchand v Dharamdas Tharwerdas* A I R 1928 Sind 85 106 I C 486 But under this amendment the Insolvency Court can only hold a preliminary enquiry and if it is satisfied that there are grounds for proceeding against the insolvent it is to make a complaint to the nearest first class Magistrate having jurisdiction (2) under the repealed subsections the Insolvency Court before proceeding to try the insolvent for offences against the insolvency law was required to issue a notice on the insolvent to show cause why he should not be tried for such offences [see *Virjilal Virchand's* case *supra*] but under the present amendment which is on the lines of the English Bankruptcy law prosecution can be started without consulting the bankrupt see Statement of Objects and Reasons for Bill No 31 of 1925 published on August 29 in the Gazette of India P V p 15 Also read the following Report of the Select Committee on the said Bill published in the Gazette of India dated the 6th February 1926 Part V p 23— We are of opinion that the trial of these comparatively minor offences by the High Courts and District Courts is a waste of the time of those Courts and that in any case it is undesirable that the Court dealing with the insolvency proceedings should itself try offences of this kind in regard to which it may reasonably be supposed to have formed an opinion prejudicial to the alleged offender We have accordingly pro-

vided that all such cases shall be tried by Magistrates, on complaints preferred by the Insolvency Courts, under the same procedure as is laid down by section 476 of the Code of Criminal Procedure, 1898. Our re draft of these sections removes the ambiguity which has been pointed out in some of the opinions as to the stage of the trial at which the Court, was under the Bill, as introduced, to frame a charge." See also Civil Justice Com Report, 1924-25, para 16, p 233. The effect of the amendments of the section is to give the Court a discretion so that it may satisfy itself in any way it thinks proper on the facts of each particular case as to the propriety of ordering prosecution under this section. The Court may pass an order *ex parte* and in the absence of the insolvent, *Jewraj Khanalal v Dayal Chand* 55 Cal 783 47 CLJ 250 AIR 1928 Cal 211 111 IC 372, that is, without issuing any notice to the insolvent or without any reference to him, *Ibid* Cf *Virjil Virchand v Dharamdas*, AIR 1928 Sind, 85 106 IC 483. The history and object of the amendment and its effect has been very ably set out by Suhrawardy J in *Jewraj Khanalal* case, which please read.

Operation The Act IX of 1926 is in operation from 1st January 1927, *vide* Notification No F-296/1-15/25 dated the 1st May, 1926 published in the Gazette of India (dated 8-5-1926) Part I, p 550. "In pursuance of sub-section (2) of sec 1 of the Insolvency (Amendment) Act, 1910 (IX of 1926) the Governor General in Council is pleased to appoint the first day of January, 1927 as the date on which the said Act shall come into force."

Is satisfied The Court must be *satisfied* of the existence of a *prima facie* ground for proceeding against the insolvent, inasmuch as a penal action should never be taken on mere suspicion see *Karuthan Chettiar v Raman Chetty*, AIR 1926 Mad 1139 24 LW 486 97 IC 590 Cf *A K R Firm v Shaik Jooman* 5 Rangoon 50 AIR 1917 Rang 126 101 IC 419. Neither this section nor the previous one says anything as to by whom the Court is to be satisfied. The Court may be satisfied from the records or it may be satisfied from any party, see *Kadir Baksh v Bhojani* 14 All 145. It may also hold an enquiry for the purpose, if it so likes, but the preliminary enquiry that may be held hereunder need not be a judicial enquiry. It is similar to the one in sec 476 of the Cr P Code, *Jewraj Khanalal v Dayal Chand* *supra*. The Court can authorise the receiver to ascertain the facts relating to a supposed offence and to report to him, *Monmohan v Hemanta*, 23 CIJ 553. There will be no contravention of this section if the Court proceeds on the creditor's complaint and receiver's report without taking

any sworn evidence *Jc raj Khariwal's case* Vide also the notes and cases under sec 69 at p 441, ante

Who can take action The offences mentioned in section 69 being disciplinary offences, primarily, it is the Court that is affected by their commission therefore it is the Court that should take action see sub sec (1) See also *Palaniappa v Subramania* (190) M W N 135 38 M L J 338 11 L W 145 54 I C 40, *Virchand v Bulakidas* 55 I C 717, *Jaduram v Mahabir Prosad* 39 All 171 37 I C 996 Under this section the Insolvency Court can only hold a preliminary investigation and record a finding as to the result thereof and then make a formal complaint in writing to the nearest Magistrate A creditor may move in the matter in the sense that he can furnish satisfactory proof to the Court that there is ground for inquiring into the alleged offence A receiver may be authorised by the Court to ascertain the facts relating to a supposed offence and to report to it with a view to the adoption of such steps as may be deemed necessary in the interests of justice *Monmohar v Hemantakumar* 23 C L J 553 Vide also the notes at p 441 ante

Nature of Proceedings Proceedings against insolvents under this section are criminal proceedings and it is necessary that there should be a charge, a finding and a conviction as a foundation for the sentence and these should be strictly and accurately pursued and if on any of these points a substantial defect should appear it would be a ground for reversing the proceedings *Harihar Singh v Moheswar* 18 C W N 692 16 Cr L J 135 27 I C 199 *Nasab v Topan Ram* 35 I C 494 62 P W R 1916 110 P R 1916 145 P L R 1916 17 Cr L J 18 *Imruddi Karilar v Jadab Karilar* 19 C L J 430 19 I C 920 The evidence should be directed to the proof of the offence so that the accused may be in a position to rebut the same *Rash Behari v Bhagwan Chunder* 17 Cal 209 see also *In re Lalabhdas Jaitan* 27 Bom 394 *Ramasami v Bank of Madras* 6 I C 80 *Hammad Ishan v Emperor* 5 I C 960 *Ngachock v MGP* 4 I C 6 U B R (1914) 1st Qr 1 The hearing of the case should take place on an appointed date and the insolvent should have an opportunity to defend himself *Muhammad Ishaullah v Emperor* 18 Cr L J 409 38 I C 969 (All) Cf *Anapathya v Chimray* 19 Cr I J 627 45 I C 65 (Nag) The proceedings should not be based merely upon evidence given on behalf of the creditor when opposing the application of a debtor to be adjudged insolvent but evidence as to specific acts alleged against the debtor should be recorded *de no o Nathumal v District Judge of Benares* All 54 11 L J 613 6 I C 80 *Nandkishore v Siraj Mal* 3 All 46

Patun Din v Emperor, 20 O C 123 39 I C 986 Slight errors or irregularities in framing the charge will not however vitiate the conviction unless such errors etc have occasioned a failure of justice Cf *Joseph Perry v Official Assignee Calcutta*, 24 C W N 425 31 C L J 209 36 I C 728 (a case under the Presidency Act) Charges should be framed strictly in the language of the section that defines the offence together with the particulars of the conduct of the insolvent relied upon to establish the charges, *Ganga Prasad v Madhuni Saran* 3 A L J 331 A I R 1927 All, 352 100 I C 550 Cf *1 K R v Sheikh Jooman*, 5 Rangoon, 50 Conviction can result only from proof of the offences and not from mere suspicion which should on no account be allowed to pose as proof *Lucas v Official Assignee*, 24 C W N 418 36 I C 577 It seems that a case under the section will be a warrant case and not liable to be committed to the sessions, comp *Emperor v Girish Chandra* 36 Cal 785

An order of sentence passed against an insolvent must be based upon legal evidence and the depositions of witnesses whom the insolvent had an opportunity of cross-examining The report of the receiver to the effect that insolvent has been guilty of a misconduct is not admissible in evidence for the purpose of convicting him The report of the Receiver may be evidence for special purposes e.g., in determining whether the insolvent should be discharged [see sec 42 (2)], or in considering the sensibility of a proposal for composition [see sec 38 (4)], but is not evidence for the purpose of all possible proceedings under the Act, *Nanda Kishore v Surajmal* All 429 13 A L J 642 29 I C 998 See also *Hanhar v Maheshur* 18 C W N 692 27 I C 199, *Basanti Bai v Nanke Mal* 46 All 864 23 A L J 792 A I R 1926 All 29 39 I C 357 Vide notes at p 444, ante

Formerly it was held that though the Receiver's report was not evidence to sustain a conviction, still on the strength of such report, the Court could give permission to the Receiver to prosecute the insolvent, *Singu Bala v Rama Samiah* 42 I C 608 6 L W 382 This decision should now be taken as modified by the present sec 70 The receiver's report may not be *per se* legal evidence, (though it has been declared to be evidence for the purposes of secs 38 and 42) [see *Basanti Bai's* case, *supra* cited also at p 317, ante] yet for the purposes of the "preliminary enquiry" contemplated in this section, the Insolvency Court can act upon such report

Formerly bankruptcy offences were triable by the Insolvency Court but now they have been made triable

exclusively by the Criminal Court. This change in the venue seems to have brought about two very important results. *First*, as regards appeals or revisions [*vide* under the next heading], *secondly* as regards the administration of oath to the insolvent himself. Formerly, the Insolvency Court taking cognisance of the matter, oath could be administered to the insolvent during the trial of a bankruptcy offence, [see 34 All 382, 37 All 429], but now the position seems to be different, Cf 36 All 576 (583), F B

Appeal Bankruptcy offences being now triable exclusively by the Criminal Courts, appeals in connection therewith will be regulated by Ch XXXI and revisions by Ch XXXII, of the Criminal Procedure Code. *Vide* notes under the heading "Appeals" under section 69, *ante*. Prior to the amendment of 1926, the Insolvency Court, before holding a trial was to issue a rule calling upon the insolvent to show cause why a charge should not be framed against him, and the order issuing the rule was not appealable. Cf *Monmohan v Hemanta* 23 C L J 553 34 IC 777. Likewise it was held that no appeal lay against an order of the District Judge refusing to take action against the insolvent, see *Palaniappa Chetti v Subramania*, 38 M L J 338 (1920) M W N 135 54 IC 740. *Gujar Shah v Barkat Ali* 1 Lah 213 56 IC 740. *Iyappa Nair v Manicka Asari*, 40 Mad, 630, *Digendra v Ramani Mohan*, 22 C W N 958 48 IC 333 N B—These cases have been distinguished in *Karuthan Chettiar v Raman Chetti*, 45 M 804 18 L W 837 (1923) M W N 838 79 IC 340. Naturally, these decisions have lost much of their importance after the enactment of the new sec 70. But they may be consulted for the purpose of determining whether a person who invites a subordinate Insolvency Court to hold an investigation and make a complaint under this section will be looked upon as an aggrieved person so as to be entitled to appeal to the District Court in the event the subordinate Court declines to interfere.

Under sec 408, Cr P Code, an appeal from a conviction by a Magistrate under this section will lie to the Court of Session, and as that Court may itself be the Insolvency Court forwarding the complaint, a question may arise whether by

reason of such position the later Court is debarred from hearing the appeal. Of course, so far as the language of the statute goes, there is no technical bar, Cf *Pandia Mahar v Emperor*, 26 Cr L J 1481 89 IC 104, *Srikrishna v Emperor* 21 A L J 90 24 Cr L J 144 AIR 1923 All 193 71 IC 368, but the procedure will be highly objectionable on the grounds of exp

ency, *Mamoon v Emperor*, 4 Lah L J 452 23 Cr L J 446 A I R 1922 Lah 30 67 I C 622 Cf Sec 556 of the Cr P Code, 1898, also *Oziullah v Beni Madhab*, 26 C W N 878 36 C L J 180 A I R 1922 Cal 298, but see *Emperor v Gundoo Chiklo*, 23 Bom L R 842 22 Cr L J 603 62 I C 875, R *Mudkaya* 28 Bom L R, 1302 A I R 1927 Bom, 35

71. [New.] Where an insolvent has been guilty of any of the offences specified in section 69, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved

Criminal liability after discharge or composition

This section is new and is on the lines of section 135 of the Presidency towns Insolvency Act, 1909 Comp sec 16 of the English Bankruptcy Act, 1914 As to the reason for the enactment of this section read the quotation (at p 433) from the Statement of Objects and Reasons Also compare it with sec 162 of the Bankruptcy Act, 1914 It lays down that where the insolvent has been guilty of an offence under sec 69 he is not exempt from criminal proceedings by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved (see sec 28, ante)

72. [§53] (1) An undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that he is an undischarged insolvent shall on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months or with fine, or with both

Undischarged insolvent obtaining credit

(2) Where the Court has reason to believe that an undischarged insolvent has committed the offence referred to in sub section (1) the Court after making any preliminary inquiry that may be necessary may send the case for trial to the nearest Magistrate of the first class, and may send the accused in custody or take sufficient security for his appearance before such Magistrate and may bind over any person to appear and give evidence on such trial

The Section This is section 53 of the Act of 1907 and corresponds to sec 155 of the Bankruptcy Act 1914. It obliges an undischarged insolvent not to borrow fifty rupees or upwards from any person without first informing him that he is an undischarged insolvent. The real object of the section is to render the insolvent incapable of doing mischief to innocent persons before discharge. Where an application is made under this section the Court has to consider the following questions (a) whether the debtor was an undischarged insolvent, (b) whether he obtained credit of Rs 50/ or upwards and (c) whether he in fact informed the person from whom he obtained the credit of his bankruptcy. *In re Firm of Utma Mallick*, 23 S L R 63; A I R 1928 Sind 114 107 I C 442. The section does not seem to debar an insolvent from raising loans from different persons aggregating to an amount exceeding Rs 50. Sub sec (1) defines the offence and sub-sec (2) prescribes the only mode by which the offender can be brought to trial, 53 Cal 929 44 C L J 350 *infra*.

Undischarged insolvent There is some doubt as to whether the expression includes an insolvent who has not yet been adjudicated. The term 'insolvent' has not been defined. There is a definition of the term in sec 96 of the Contract Act, *vide p 4 ante*. The person who makes a bankruptcy petition must necessarily be an insolvent. So an insolvent may come within the meaning of the expression even prior to his adjudication. The doctrine of relation back enunciated in s 28(7) also lends support to this view. The expression should be interpreted in a literal sense and should not be limited to adjudged insolvents only. Whether a person is an undischarged insolvent should be determined with reference to this Act and not with reference to the Presidency Towns Insolvency Act, see *Ashutosh Ganguly's case* 44 C L J 350 (359), *infra*.

Obtaining Credit If the insolvent manages to get, in fact, a credit for the prohibited amount without disclosing the fact of his not obtaining any discharge, that will be sufficient to render him liable. It will be no defence for him to say that he got the credit under pressing necessity or *bonafide* or by virtue of previous agreement or so forth, *Reg v Peters* 16 Q B D 636. The absence of any intention to defraud will not absolve the insolvent. *Re v Dyson*, (1804) 2 Q B D 176. See also Halsbury, Vol II pp 268 351. The obtaining of credit without the necessary disclosure constitutes the offence and the psychology of the bankrupt has got nothing to do with it, *King v Idcard* (1924) 1 K B 311. It is the obtaining of the credit and not the mere asking for it that renders the insolvent liable, [16 Q B D 636]. So where the insolvent orders goods on credit of a value not exceeding Rs 50, but retains goods

ency *Mamoon v Emperor*, 4 Lah L J 452 23 Cr L J 446 A I R 1922 Lah 30 67 I C 622 Cf Sec 556 of the Cr P Code, 1898, also *Oziullah v Beni Madhab*, 26 C W N 878 36 C L J 180 A I R 1922 Cal 298, but see *Emperor v Gundoo Chikko*, 23 Bom L R 842 22 Cr L J 603 62 I C 875, Re *Mudkaja* 28 Bom L R, 1302 A I R 1927 Bom, 35

71. [New.] Where an insolvent has been guilty of any of the offences specified in section 69, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved

Criminal liability after discharge or composition

This section is new and is on the lines of section 103 of the Presidency towns Insolvency Act, 1909 Comp sec 16 of the English Bankruptcy Act, 1914 As to the reason for the enactment of this section, read the quotation (at p 455) from the Statement of Objects and Reasons Also compare it with sec 162 of the Bankruptcy Act, 1914 It lays down that where the insolvent has been guilty of an offence under sec 69, he is not exempt from criminal proceedings by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved (see sec 28, ante)

72. [§53] (1) An undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that he is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both

Undischarged insolvent obtaining credit

(2) Where the Court has reason to believe that an undischarged insolvent has committed the offence referred to in sub section (1) the Court after making any preliminary inquiry that may be necessary may send the case for trial to the nearest Magistrate of the first class, and may send the accused in custody or take sufficient security for his appearance before such Magistrate and may bind over any person to appear and give evidence on such trial

The Section This is section 53 of the Act of 1907 and corresponds to sec 155 of the Bankruptcy Act 1914. It obliges an undischarged insolvent not to borrow fifty rupees or upwards from any person without first informing him that he is an undischarged insolvent. The real object of the section is to render the insolvent incapable of doing mischief to innocent persons before discharge. Where an application is made under this section the Court has to consider the following questions (a) whether the debtor was an undischarged insolvent, (b) whether he obtained credit of Rs 50/ or upwards and (c) whether he in fact informed the person from whom he obtained the credit of his bankruptcy. *In re Firm of Utma Mallick* 23 S L R 63 A I R 1928 Sind 114 107 I C 442. The section does not seem to debar an insolvent from raising loans from different persons aggregating to an amount exceeding Rs 50. Sub sec (1) defines the offence and sub-sec (2) prescribes the only mode by which the offender can be brought to trial 53 Cal 929 44 C L J 350 *infra*.

Undischarged insolvent There is some doubt as to whether the expression includes an insolvent who has not yet been adjudicated. The term insolvent has not been defined. There is a definition of the term in sec 96 of the Contract Act *vide* p 4 *ante*. The person who makes a bankruptcy petition must necessarily be an insolvent. So an insolvent may come within the meaning of the expression even prior to his adjudication. The doctrine of relation back enunciated in s 28(7) also lends support to this view. The expression should be interpreted in a literal sense and should not be limited to adjudged insolvents only. Whether a person is an undischarged insolvent should be determined with reference to this Act and not with reference to the Presidency Towns Insolvency Act see *Ashutosh Ganguly's case* 44 C L J 350 (359) *infra*.

Obtaining Credit If the insolvent manages to get in fact a credit for the prohibited amount without disclosing the fact of his not obtaining any discharge that will be sufficient to render him liable. It will be no defence for him to say that he got the credit under pressing necessity or *bonafide* or by virtue of previous agreement or so forth. *Reg v Peters* 16 Q B D 66. The absence of any intention to defraud will not absolve the insolvent *Re v Dison* (1894) 1 Q B D 16. See also Halsbury Vol II pp 268 351. The obtaining of credit without the necessary disclosure constitutes the offence and the psychology of the bankrupt has got nothing to do with it. *King v Edvard* (1924) 1 K B 311. It is the obtaining of the credit and not the mere asking for it that renders the insolvent liable [16 Q B D 636]. So where the insolvent orders goods on credit of a value not exceeding Rs 50 but retains goods

over that value, he becomes liable, *Reg v Juby*, 35 W R 168. It should be noticed that the expression "obtaining credit" includes the securing of goods on trust or on sale account, *In re Firm of Utma Mallick*, 23 S L R 63 A I R 1928 Sind 114 107 I C 442. The giving of information of bankruptcy is a positive act. So if the debtor remains silent at the time of getting the credit, he will be convicted, *Re Peel*, 19 T L R 207, but it seems that where the factum of bankruptcy is already known to the intending creditor, a mere omission on the insolvent's part to inform him of it will not render him liable to conviction, *Ibid*. For the purpose of giving sanction for prosecution against an individual partner of a firm it is immaterial that credit was obtained by him as a partner of the firm, *In re Firm of Utma Mallick*, *supra*.

On Conviction Etc. When the insolvent gets the credit condemned by this section he becomes punishable with imprisonment—necessarily of *either* description—for a term which may extend to six months or with fine or with both. The conviction under this section must be by the nearest Magistrate of the first class, see sub-sec (2). Where a special offence is created and a particular penalty is prescribed by a special statute, the special procedure should be strictly followed, *Ashutosh Ganguli v Watson*, 53 Cal, 929 44 C L J 350 A I R 1927 Cal 149 98 I C 116.

Venue of Court As to which Magistrate is to try an offence under this section, it seems that the Magistrate nearest to the Insolvency Court has jurisdiction. Under the English law such an offence is triable by the Court having jurisdiction where the credit is obtained, see *Reg v Ellis*, (1899) 1 Q B 230 19 Cox C C 210.

Sub sec (2): Mode of bringing the offender to trial: When the Court finds that there are reasons to believe that an undischarged insolvent has got the credit referred to in sub-section (1) it will make the necessary preliminary enquiry and then if it likes it may send the case for trial to the nearest Magistrate of the first class and such Magistrate, if he finds the insolvent guilty of the offence mentioned in sub-section (1), shall convict him and inflict the punishment mentioned therein. The Court while forwarding the insolvent to the Magistrate may send him in custody or may take sufficient security from him for his appearance before the trying Magistrate. The Court may also bind over any person to appear and give evidence in the trial. This sub section lays down the only mode in which an undischarged insolvent, accused of an offence under sub sec (1), can be proceeded against. No prosecution can be instituted under this section unless the Insolvency Court sends the case here under. There can be no conviction on the

complaint of a *private* person, (Suhrawardy & B B Ghose JJ concurring, Duval J holding *contra*) *Ashutosh Ganguli v Watson*, 53 Cal, 929 44 C L J 350 A I R 1927 Cal 149 98 I C 116 Under the English law, a prosecution cannot be started without an order of the Court As to what circumstances have to be brought out in a prosecution under this section, see *Re Firm of Utna Mullick* 23 S L R 63 A I R 1928 Sind 114 107 I C 442

73 [New.] (1) Where a debtor is adjudged or re adjudged insolvent under this Act, he shall subject to the provisions of this section, be

Disqualifications of insolvent

disqualified from—

(a) being appointed or acting as a Magistrate

(b) being elected to any office of any local authority where the appointment to such office is by election or holding or exercising any such office to which no salary is attached and

(c) being elected or sitting or voting as member of any local authority

(2) The disqualifications which an insolvent is subject to under this section shall be removed and shall cease if—

(a) the order of adjudication is annulled under section 35 or

(b) he obtains from the Court an order of discharge whether absolute or conditional with a certificate that his insolvency was caused by misfortune without any misconduct on his part

(3) The Court may grant or refuse such certificate as it thinks fit but any order of refusal shall be subject to appeal

This section is entirely new and is taken from sec 37 of the Bankruptcy Act 1883 Also see sec 9 of the Bankruptcy Act 1890 It is introduced in the Act with the following note of the Select Committee Under the Indian law no statutory disabilities attach to the position of an undischarged insolvent It is doubtful whether public opinion in this country is at pre-

sent inclined to attach much disgrace to a person of this position, but it appears desirable that the sense of the community should be stimulated by providing certain statutory disqualifications in addition to those already imposed, *e g* by the Regulation relating to members of the Legislative Council. A parallel provision is to be found in sec 32 of the Bankruptcy Act, 1883 (46 & 47 Vict, C 52)"—*Notes on Clauses*. The principle underlying such disability is that a man who cannot manage his own affairs should not be entrusted with the affairs of others which he must have necessarily to look to if he were allowed to hold important public offices. [See Sir George Lowndes's speech.] It will be seen from sub sec (1) that the offices from which the insolvent is excluded all involve the performance of important public duties.

Sub sec (1). The disqualifications of the insolvent under this section have been enumerated in the clauses (a) (b) and (c) of this sub sec. The insolvent cannot be appointed, or act as, a Magistrate (cl a). He cannot be elected to any honorary office of any local authority (cl b). He cannot be an elected member of any local authority, *e g* he cannot be a commissioner of any Municipality or of any Legislative Council or so forth (cl c). Under the English law too the disqualifications are of a like nature. Under sec 34 of the Bankruptcy Act, 1883, if a person is adjudged bankrupt whilst holding any of the *exempted* offices, his office thereupon becomes vacant. That will also be the case under the present Act. This is evident from the present "continuous" forms of the verbs in the clauses (a) (b) and (c), *viz* —*acting, holding, exercising sitting and voting*. These disqualifications do not operate retrospectively, see *Re School Board Election for Pulborough* (1894) 1 Q B 725.

Besides the above disqualifications, the insolvent is under other disabilities under different statutes. Under the Government of India Act an undischarged insolvent or a discharged insolvent without the necessary certificate has no right to be elected a member of any Legislative Council, see the rules framed under secs 64-72 of the Government of India Act. He is liable to be removed from his office as a guardian of property under sec 39 of the Guardians and Wards Act (Act VIII of 1890), or from that of a trustee, under sec 73 of the Indian Trusts Act (Act II of 1882). An adjudication disables a person

Effect of bankruptcy
on partnership

from acting as an agent or from continuing as a partner (see secs 201 and 254 of the Indian Contract Act, 1872. Cf also sec 3 of the Powers-of-Attorney

Act VII of 1882 and *Kalyani v Bank of Madras*, 39 Mad 693). Insolvency may be a bar to one's being appointed an

administrator, though there is no such disqualification in the case of an executor, William's *Executors*, 10th Ed pp 162, 359 *Vide* also the cases cited at p 365 of the author's *Ind Succession Act* Under the disciplinary

On the right of practising as a pleader powers of the High Court, it can suspend the license of a pleader, adjudicated an insolvent But in actual practice this is seldom done unless the bankruptcy jeopardises the professional integrity of the practitioner In this connection see *Government Pleader v D N Deshpande*, 52 Bom 559

Sub-sec. (2): Duration and Removal of Disqualification : Under the English law the above statutory disqualification cannot last for more than 5 years But under the present Act there is no such time limit So here the disqualification will be life long unless (a) the order of adjudication is annulled under sec 55 or (b) unless the insolvent obtains with his discharge a certificate from the Court to the effect that *his insolvency was caused by misfortune unattended with any misconduct on his part*

In order to be entitled to the benefit of clause (a) of the Sub section, the annulment must be under section 35, that is, the annulment is an *honourable* one, being the necessary corollary of the non-insolvency of the bankrupt or of full payment of his debts Annulment under secs 36, 39 or 43 is of no use

Certificate The certificate of misfortune and absence of misconduct must be granted by the Court granting the discharge As to what is "misfortune" see *Re Lord Colin Campbell*, 20 Q B D 816, *Re Thompson* (1918-19) B & C R 150 The language of the section is defective and is open to the contention that such a certificate should be obtained along with the order of discharge and not subsequently, so where no such certificate is granted at the time of the order of discharge, it must be taken as having been refused, of course, subject to a question of appeal under sub-sec (3) But we are apt to think that what is meant here is that the certificate cannot be granted until the insolvent gets an order of discharge Under the English Bankruptcy rules (v 6-c), the certificate is granted upon a formal application in open Court

Sub-sec. (3): Appeal The granting of the certificate is in the discretion of the Court, which always means judicial discretion There is an appeal against an order refusing to give the certificate, but no appeal lies against the order granting it

PART V.

SUMMARY ADMINISTRATION

74. [§48.] When a petition is presented by or against a debtor, if the Court is satisfied by affidavit or otherwise that the property of the debtor is not likely to exceed in value five hundred rupees, the Court may make an order that the debtor's estate be administered in a summary manner, and thereupon *the provisions of this Act shall be subject to the following modifications namely —*

- (i) *unless the Court otherwise directs no notice required under this Act shall be published in the local official Gazette,*
- (ii) *on the admission of a petition by a debtor, the property of the debtor shall vest in the Court as a receiver*
- (iii) *at the hearing of the petition the Court shall inquire into the debts and assets of the debtor, and determine the same by order in writing, and it shall not be necessary to frame a schedule under the provisions of section 33*
- (iv) *the property of the debtor shall be realised with all reasonable despatch and thereafter, when practicable distributed in a single dividend*
- (v) *the debtor shall apply for his discharge within six months from the date of adjudication, and*
- (vi) *such other modifications as may be prescribed with the view of saving expense and simplifying procedure*

Provided that the Court may at any time direct that the ordinary procedure provided for in

this Act shall be followed in regard to the debtor's estate, and thereafter the Act shall have effect accordingly

This is sec 48 of the Act of 1907 wholly recast, it corresponds to sec 129 of the Bankruptcy Act 1914 (as amended in 1926)

For the reasons of the amendments in the section, vide the Statement of Objects and Reasons. The effect of these amendments has been to extremely shorten the insolvency proceedings in minor cases and thereby facilitate a speedy distribution of the insolvent's assets. The provision for summary administration contained in this section has been made with the object of saving expenses and simplifying procedure in small cases in which the insolvent's properties do not exceed Rs 500 in value. Compare sections 121 and 122 of the Bankruptcy Act with this section.

When to adopt summary procedure This section will apply whether the insolvency petition be made by the creditor or the debtor. This summary procedure may be adopted only in cases in which the properties of the insolvent do not exceed in value five hundred rupees. As to whether the property of the insolvent is worth this statutory amount or not can be ascertained from an affidavit or from some other convenient evidence. It seems that *property* here means the property that is distributable in insolvency or in other words the property remaining after deduction of all necessary charges etc. Cf Halsbury's *Laws of England* Vol II p 284.

The Court may etc —It is always discretionary with the Court to follow or not to follow the summary procedure. So, the Court can for good reason refuse summary administration even when the value of the insolvent's property does not exceed Rs 500. Before applying the provisions of summary administration the Court should make a formal order that the debtor's estate be administered in a summary manner.

When an order for the adoption of a summary procedure is made the provisions of the Act will apply only subject to the modifications mentioned in clauses (1) to (11).

The modifications are as follows.

Clause (1) —No notice required under this Act shall be published in the local Gazette but the Court if it so likes can insist on such publication.

Clause (11) —When the petition is made by the debtor and it is admitted under sec 18 the property of the debtor will instantaneously vest in the Court—as a Receiver.

Vesting of Property in summary administration In a case of summary administration the insolvent's property vests

in the Court as a receiver, on the admission of the bankruptcy petition by the debtor. The property vests in the sense in which the term is used in s 28 (2), therefore, the appointment of the interim receiver in such a case is superfluous or meaningless. When the property is so vested it cannot without the permission of the Court, be the subject of an execution sale, but any how if the property is sold in auction without the necessary permission, a purchaser who has bought in good faith is entitled to retain the property, and the creditors of the insolvent are entitled only to the sale proceeds of the property as assets for distribution among them, *Ramanatha Mudaliar v Vijayaraghavalu*, AIR 1927 Mad 983 106 IC 34.

Clause (iii) Investigation into the insolvent's assets and debts can be made at the time of hearing the insolvency petition, and the amounts of such assets and debts can be forthwith determined and it is not necessary to frame a schedule of creditors under sec 33.

Clause (iv) The debtor's assets should be collected with all reasonable despatch and the dividend if practicable should be distributed in a single dividend.

Clause (v) The insolvent will be bound to apply for his discharge within six months from the date of adjudication.

Clause (vi) —Under this clause, rules prescribed for cases summarily administered will go to modify the general provisions of the Act. Under sec 79 (2)—(d) the High Court has power to make rules for this procedure to be followed in the case of estates to be administered in a summary manner.

Proviso The Court has power to direct at any time that the ordinary procedure should be followed and thereafter the summary provisions will cease to apply.

PART VI.

APPEALS

75. [§ 46] (1) *The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court, and the*

Appeals

order of the District Court upon such appeal shall be final

Provided that the High Court for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law may call for the case and pass such order with respect thereto as it thinks fit

Provided further that any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub section (1) of section 100 of the Code of Civil Procedure 1908

(2) Any such person aggrieved by *any such decision or order of a District Court as is specified in Schedule I* come to or made otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court

(3) Any *such* person aggrieved by any other order made by a District Court otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court by leave of the District Court or of the High Court

(4) The periods of limitation for appeals to the District Court and to the High Court under this section shall be thirty days and ninety days, respectively

The Section This is section 46 of the Act of 1907 and corresponds to sec 108 of the Bankruptcy Act 1914 as amended by the Act of 1926 but its language materially differs from the old sec 46 *Ram Chand v Mohra Shah* 30 Punj L R 320 11 Lah L J 198 AIR 199 Lah 627 119 IC 4 The reason for this section was thus given in the Statement of Objects and Reasons of the Act of 1907 — As usual the question of appeals presents features of no inconsiderable difficulty. The solution here suggested is first to subordinate to the District Court all other Insolvency Courts secondly to follow the English Statute of 1883 so as to give an appeal from all orders of subordinate Courts to the District Court whose appeal +

order should however be final thirdly, to limit strictly to particular classes of orders the right of appeal from orders made by a District Court otherwise than in appeal, and fourthly, for this purpose to treat as a District Court any subordinate Court to which the District Court may have transferred an appeal" "A right of appeal is given to the High Court from any order made by a District Court in the exercise of original insolvency jurisdiction, but except in regard to certain specified orders, sub clause (3) of the section requires the leave of either of the District Court or of the High Court to be first obtained —*Select Committee Report on Act III of 1907* It should be noticed that the right of appeal belongs to (1) the debtor, (2) any creditor, (3) the receiver and (4) any other person aggrieved This has been made clear by the amendment in the first three italicised lines Cf *Ram Chand v Firm Mohra* 11 Lah L J 198 AIR 1929 Lah 622 119 IC 427 The right of appeal is thus given not merely to the parties to the order, but also to any person aggrieved by it, Cf 15 C W N 253 The principle of sec 104 or O XLIII of the Civil Procedure Code should not be imported to limit the right of appeal hereby conferred, inasmuch as the provisions of the C P Code apply to Insolvency proceedings only subject to the provisions of this Act Cf *Chuni Lal v Behari Lal*, 21 P W R 1916 33 IC 995, *Salimmamma v Valli Hussanbha*, 21 M L J 104 10 M L T 78 (1911) 2 M W N 97 11 IC 653 The words "may appeal" imply the subsistence of the right of appeal and do not suggest that the filing of appeal is compulsory, *Duni chand v Muhammad Hussain* 22 P R 1917 14 P W R 1917 40 IC 220 There is Schedule I for appeals (as of right) to the High Court but there is no Schedule for appeals to the District Court So it necessarily follows that all orders passed by a Subordinate Court are open to appeal to the District Court provided they are made in the exercise of insolvency jurisdiction Unless a matter comes within the denomination of "decision" or "order" there is no appeal It must be a judicial order deciding some point judicially an order regulating procedure merely seems not to be appealable, Cf *Mahomed Haj Fssack v Shri Ibdool Rahman*, 40 Bom 461 A District Judge sitting as an appellate Court hereunder can utilise all the provisions of C P Code relating to appeals So that he can entertain a review subject to a further appeal under O XLVIII r 7 to the High Court, *Munna Lal v Kunj Behari*, 44 All 605 20 A L J 517, vide under "Shall be final" at p 463

Sub-sec. (1): Aggrieved person The expression means a person who has suffered a "legal grievance," that is, a person against whom a decision has been pronounced which has unjustly deprived him of something or wrongfully refused him

something which he had a right to demand or wrongfully affected his title to something, *Ex parte Sidebotham*, 14 Ch D 458, *Lalit Sahaya v Abdul Gani*, 12 C L J 452 15 C W N 253, *Official Receiver, Tanjore v Nataraja Sasringala*, 46 Mad, 405 A I R 1923 Mad 355 44 M L J 251 (1923) M W N 212 72 I C 225, *Re Reed Bowen & Co* (1887) 19 Q B D 174, or, in other words, a party to the dispute before the Court who has endeavoured to maintain the contrary of that which has taken place, *James Finlay & Co v Tulsidas*, 118 I C 198 It does not mean a man who is disappointed of a benefit which he might have received if some other order had been passed, *Radha Mohan v Ghasi Ram*, 38 P W R 1917 93 P R 1917 41 I C 96 The word "person" is wide enough to include any

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person whether he be a party to the insolvency proceeding or not, (*Ibid*) Cf 15 C W N 253, *supra* In the present Act this has been made clear by separately mentioning the debtor, creditor and the Receiver, which words did not occur in the Act of 1907 After adjudication, the insolvent has no legal interest in the estate and cannot be aggrieved by any order made in the course of the realisation thereof Therefore, he will have no right of appeal against an order confirming the sale of part of the estate by the Official Assignee, *Hari Rao v Official Assignee*, 49 Mad, 461 (1926) M W N 364 (F B)—disapproving *Sriasubramania v Theethappa*, *infra*, and following *Sakharat Ali v Radha Mohan* 41 All, 243 With reference to *Hari Rao's* case, it should be remembered that it was decided under the Presidency Towns Insolvency Act, the wordings whereof are similar to sec 46 of the old Act III of 1907 and that the present Act (of 1920) gives the debtor a right of appeal as a matter of course, see *Ram Chand v Firm Mohra*, 11 Lah L J 198 A I R 1929 Lah 622 119 I S 427 Similarly he will not be aggrieved when a transfer by him is annulled without notice to the alienee, and therefore he can not appeal *Mastan Khan v Syed Mahomed Khawam*, 2 Mys L J (B & C) 15 An assignee from the insolvent may come within the meaning of the expression if he is affected by any decision or order of the Court *Haji Jackeria v R D Sethna* 12 Bom I R 27 Such an assignee however cannot be considered to be aggrieved by an order admitting the proof of a creditor, inasmuch as he is only very remotely affected by the decision in favour of the creditor, and therefore he cannot appeal against the said order, *Illagappa v Illachami*, A I R 1928 Mad 981 112 I C 623 The fact that the appellant was allowed by the lower Court to cross-examine the witnesses of the creditor would not give him *locus standi* in the proceedings so as to enable him to present an appeal against the order in favour of the creditor, *ibid* A third party dispossessed by

the Receiver in his attempt to seize insolvent's property will be an aggrieved person hereunder, *Charu Chandra v Hem Chandra* 47 IC 62 Cf 31 CWN 502 Where a stranger's property is sold by the Receiver as the property of the insolvent, and the stranger thereupon applies to the Court under sec 68 to have this act of the receiver rectified, but his application is dismissed as time barred, he becomes an aggrieved person within the meaning of this section, *Chandra Nath v Nagendra Nath*, AIR 1929 Cal 263 107 IC 467 Where the Court admits in proof a non provable debt, the insolvent becomes an aggrieved person and can appeal, *Siva Subramania v Theethiappa*, 47 Mad, 120 45 MLJ 166 (1925) MWN 895 75 IC 572 This case has been disapproved in *Hari Rao v Official Assignee* 49 Mad, 461 (FB) (1926) MWN 364 50 MLJ 358 23 LW 599 AIR 1926 Mad 556 94 IC 642 If the creditor's application for annulment of adjudication under sec 43 is refused he becomes an aggrieved person and gets a right of appeal, *Arunagiri Mudaliar v Kandaswami*, 19 LW 418 (1924) MWN 331 AIR 1924 Mad 685 82 IC 955 An unpaid creditor of a bankrupt is a "person aggrieved" by the improper granting of an order of discharge to the bankrupt, and as such is entitled to appeal against the order, *Ex parte Castle Mail Packets Co* (1886) 18 QBD 154 A transferee is an aggrieved person, when the transfer in his favour is annulled under sec 53, and is therefore, entitled to appeal, *Lalji Sahay v Abdul Gani* 12 CLJ 452 15 CWN 253 7 IC 765 An Official Assignee, if aggrieved by an order of the Court can appeal, *Official Assignee v Rama Chandra*, 33 Mad, 134 In order to be called an aggrieved person the person must suffer a legal grievance, see the NOTES under section 68, ante under the heading "Persons aggrieved" at pp 423 24, and the cases thereunder see also *Revell v Blake*, (1873) LR 8 CP 533, *Ex parte the Board of Trade*, (1894) 2 QB 805, *Hanseshur v Rakhal Das*, 18 CWN 366 18 CLJ 359 So, in an Allahabad case it has been held that one creditor out of the general body of creditors of an insolvent has no *locus standi* in an application in the Insolvency Court made against the estate of the insolvent, represented by the Receiver, by a person claiming adversely to the insolvent's estate, and therefore cannot be called an "aggrieved person", so as to be entitled to appeal under this section, *Jhabba Lal v Shub Charan*, 39 All, 152 15 ALJ 1 37 IC 76, *Ishar Das v Ladha Ram*, 62 IC 924 (Lab) The reason for this decision is that where a Receiver is appointed, the creditors have, individually and except through the receiver, no interest in the insolvent's property, therefore their title is not "wrongfully affected" within the meaning of the rule in *Sidebotham's case* (14 Ch D 458) Cf sec 54

This view has not been accepted in a recent Madras decision, *Choudappa v Kathaperumal*, 49 Mad, 794 50 M L J 602 AIR 1926 Mad, 801 96 IC 944, in which it has been maintained that a person is aggrieved by an order (whether he be or be not a party to it) if the order binds him and affects his interests. Where the application for review of an order of annulment of adjudication by a creditor who has proved his debts is refused, he becomes a person aggrieved, *Abbireddi v Venkatarreddi*, 51 M L J 60 (1926) M W N 256 23 L W 644 AIR 1927 Mad, 175 94 IC 351. For the above reason, where a creditor's application under secs 53 and 54, (i.e. under sec 54A) is dismissed, he becomes an aggrieved person and has a right of appeal, *Anantanarayana Aiyar v Pannal Ramasubba*, 47 Mad, 673 18 L W 857 AIR 1924 Mad, 345 79 IC 395. Cf *Shukri Prasad v Aziz Ali*, 44 All, 71, *Nadar v Ramji Lal*, 23 A L J 503. Annulment of an adjudication made at the instance of a creditor will aggrieve him and give him a right of appeal hereunder, *Firm of Jai Singh v Normal Das* 7 Lah L J 553 AIR 1926 Lah 24 92 IC 235. Similarly in another case the right of appeal was denied to an insolvent whose petition of objection against an irregular sale of his property was disallowed on the ground that he was not an "aggrieved person" in the legal sense of the term, *Sakhawat Ali v Radha Mohan* 41 All, 243 17 A L J 229 49 IC 816. Similarly where a creditor who makes a complaint of misconduct against an insolvent under section 69 is not a "person aggrieved", and therefore not entitled to speak if the Court dismisses the complaint, *Ladurani v Mahabir* 39 All, 111 31 IC 996 15 A L J 31, see also *Dula Singh v Attar Sing* 42 IC 287 95 P L R 1917 152 P W R 1917. *Iyappa Naimar v Manikka Asari*, 40 Mad, 630, s c 27 IC 241, *Virchand v Bulakidas* 55 IC 717. Cf *Karuthan Chettiar v Raman Chetty* (1923) M W N 838 45 M L J 804 AIR 1924 Mad 185 79 IC 340. Also *Digendra v Ramani* 22 C W N 958 48 IC 333. A creditor has no right to set the Court in motion against a delinquent insolvent. So he cannot call himself an "aggrieved creditor" when the Court refuses to punish the insolvent *Palaniappa Chetty v Subramania Chetty* 38 M L J 338 (1920) M W N 135 54 IC 740. *Gujar Shah v Barkat Ali* 1 Lah 21, 56 IC 744 although the creditor is indirectly interested in seeing that the delinquent is brought to justice *James Finlay & Co v Tulvidas* 118 IC 198. Likewise the Receiver also is not an aggrieved person and cannot therefore appeal if his application to take action against the insolvent under sec 69 or sec 70 is not entertained, *Bhagwant Kishore v Sanjwal Das*, 19 A L J 701 61 IC 802. The Receiver is not aggrieved by an order annulling adjudication and therefore cannot apply for

the Receiver in his attempt to seize insolvent's property will be an aggrieved person hereunder, *Charu Chandra v Hem Chandra*, 47 I C 62 Cf 31 C W N 502 Where a stranger's property is sold by the Receiver as the property of the insolvent, and the stranger thereupon applies to the Court under sec 68 to have this act of the receiver rectified, but his application is dismissed as time barred, he becomes an aggrieved person within the meaning of this section, *Chandra Nath v Nagendra Nath*, A I R 1929 Cal 263 107 I C 467 Where the Court admits in proof a non-provable debt, the insolvent becomes an aggrieved person and can appeal, *Sri S. S. Brahma v Theethappa*, 47 Mad, 120 45 M L J 166 (1921) M W N 895 75 I C 572 This case has been disapproved in *Hari Rao v Official Assignee*, 49 Mad, 461 (F B) (1916) M W N 364 50 M L J 358 23 L W 599 A I R 1926 Mad 556 94 I C 642 If the creditor's application for annulment of adjudication under sec 43 is refused he becomes an aggrieved person and gets a right of appeal, *Arunagiri Mudaliar v Kardaswami*, 19 L W 418 (1924) M W N 331 A I R 1924 Mad 685 82 I C 955 An unpaid creditor of a bankrupt is a "person aggrieved" by the improper granting of an order of discharge to the bankrupt, and as such is entitled to appeal against the order, *Ex parte Castle Mail Packets Co* (1886) 18 Q B D 154 A transferee is an aggrieved person, when the transfer in his favour is annulled under sec 53, and is therefore, entitled to appeal, *Lalji Sahay v Abdul Gani* 12 C L J 452 15 C W N 253 7 I C 765 An Official Assignee, if aggrieved by an order of the Court can appeal, *Official Assignee v Rama Chandra*, 33 Mad, 134 In order to be called an aggrieved person the person must suffer a legal grievance, see the NOTES under section 68, ante, under the heading "Persons aggrieved" at pp 423 24, and the cases thereunder see also *Revell v Blake*, (1873) L R 8 C P 533, *Ex parte the Board of Trade*, (1894) 2 Q B 805, *Hanseshur v Rakhil Das*, 18 C W N 366 18 C L J 359 So, in an Allahabad case it has been held that one creditor out of the general body of creditors of an insolvent has no *locus standi* in an application in the Insolvency Court made against the estate of the insolvent, represented by the Receiver, by a person claiming adversely to the insolvent's estate, and therefore cannot be called an "aggrieved person", so as to be entitled to appeal under this section *Jhabba Lal v Shub Charan*, 39 All, 152 15 A L J 1 37 I C 76, *Ishar Das v Ladha Ram*, 62 I C 924 (Lah) The reason for this decision is that where a Receiver is appointed, the creditors have, individually and except through the receiver no interest in the insolvent's property, therefore their title is not "wrongfully affected" within the meaning of the rule in *Sidebotham's case*, (14 Ch D 458) Cf sec 241

This view has not been accepted in a recent Madras decision, *Choudappa v Kathaperumal*, 49 Mad, 794 50 M L J 602 AIR 1926 Mad, 801 96 IC 944, in which it has been maintained that a person is aggrieved by an order (whether he be or be not a party to it) if the order binds him and affects his interests. Where the application for review of an order of annulment of adjudication by a creditor who has proved his debts is refused, he becomes a person aggrieved, *Abhirreddi v Venkatarreddi*, 51 M L J 60 (1926) M W N 256 23 L W 644 AIR 1927 Mad, 175 94 IC 351. For the above reason, where a creditor's application under secs 53 and 54, (i.e. under sec 54A) is dismissed, he becomes an aggrieved person and has a right of appeal, *Anantanarayana Aiyar v Pannal Ramasubba*, 47 Mad, 673 18 L W 857 AIR 1924 Mad, 345 79 IC 395. Cf *Shukri Prasad v Aziz Ali*, 44 All, 71, *Nadar v Ramji Lal*, 23 A L J 503. Annulment of an adjudication made at the instance of a creditor will aggrieve him and give him a right of appeal hereunder, *Firm of Jai Singh v Normal Das*, 7 Lah L J 553 AIR 1926 Lah 24 92 IC 235. Similarly, in another case the right of appeal was denied to an insolvent whose petition of objection against an irregular sale of his property was disallowed on the ground that he was not an "aggrieved person" in the legal sense of the term, *Sakhawat Ali v Radha Mohan*, 41 All, 243 17 A L J 229 49 IC 816. Similarly where a creditor who makes a complaint of misconduct against an insolvent under section 69 is not a "person aggrieved", and therefore not entitled to speak if the Court dismisses the complaint, *Laduram v Mahabir*, 39 All, 171 37 IC 996 15 A L J 31, see also *Dula Singh v Altar Sing*, 42 IC 287 95 P L R 1917 152 P W R 1917, *Isappa Nainar v Manikka Asari*, 40 Mad, 630, s c 27 IC 241, *Virchand v Bulakidas* 55 IC 717. Cf *Karuthan Chettiar v Raman Chetty*, (1923) M W N 838 45 M L J 804 AIR 1924 Mad, 185 79 IC 340. Also *Digendra v Ramani* 22 C W N 958 48 IC 333. A creditor has no right to set the Court in motion against a delinquent insolvent. So he cannot call himself an "aggrieved creditor" when the Court refuses to punish the insolvent *Palaniappa Chetty v Subramania Chetty*, 38 M L J 338 (1920) M W N 135 54 IC 740, *Gujar Shah v Barkat Ali* 1 Lah, 213 56 IC 744, although the creditor is indirectly interested in seeing that the delinquent is brought to justice, *James Finlay & Co v Tuludas*, 118 IC 198. Likewise, the Receiver also is not an aggrieved person and cannot therefore appeal, if his application to take action against the insolvent under sec 69 or sec 70 is not entertained, *Bhagwant Kishore v Sanjival Das*, 19 A L J 701 61 IC 802. The Receiver is not aggrieved by an order annulling adjudication and therefore cannot apply for

revision of such an order, *Radha Mohan v Ghasi Ram*, *supra*. A similar principle will apply also when the creditor applies for a mere enquiry into the conduct of the insolvent and does not apply for his conviction, *Dula Singh v Attar Singh*, 42 IC 28. Vide notes under the heading "Appeal" under secs 69 and 70.

Clause (1) gives a right of appeal to every person who is aggrieved by an order passed by a Court in the exercise of its insolvency jurisdiction. So, where a Court cancels a sale of the insolvent's property by the receiver, on the ground that the sale fetched a very low price, the auction purchaser has a right of appeal, being a person aggrieved, *Chuni Lal v Behari Lal* 21 P W R 1916 33 IC 995 Cf 39 Mad 470, 44 IC 885 (Mad). Vide also the notes at p 424, *ante*. Where by an order of Court a special Receiver is appointed in supersession of the Official Receiver, who was originally appointed Receiver the Official Receiver is a person aggrieved by the order and has a right of appeal under this section, *Optical Receiver Tanore v Nataraja*, 40 Mad, 405 44 M L J 251 (1925) M W N 212 72 IC 225. The words "may appeal" mean that an aggrieved person will have the right to appeal and that he can exercise this right at his option, it does not mean that he is bound to do so or that his ordinary remedies are not open to him, *Duni Chand v Mulammad Hussan*, 22 P R 1017 40 IC 220.

An order releasing from attachment certain crops attached or seized by the Receiver at the instance of a creditor can be appealed against hereunder, *Nadas v Ramji Lal*, 47 All, 540 25 ALJ 505 AIR 1920 All 549 88 IC 944.

Non-party aggrieved person If a person becomes aggrieved by an order he will have a right of appeal notwithstanding the fact that he was not a party to the proceeding in the Court below *Rustomjee Dorabjee v R D Broilers* 53 Cal 866 44 CLJ 454.

Subordinate Court See Notes on sec 3, *ante*. No appeal lies to a High Court against an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court such appeal lies to the District Court (*Nidhan Mullick v Ramani Mohan Goswami*, 63 IC 248 [Cal]) although the value of the subject matter exceeds Rs 5000 *Fool Kumari v Khired Chandra*, 51 CWN 502 AIR 1927 Cal 474 102 IC 115. Though a Subordinate Court has for the purposes of insolvency matters concurrent jurisdiction with the District Court, still for the purposes of appeal it is subordinate to the latter *Madhorao Dorao v Nago* AIR 1923 Nag 80 71 IC 37. An Additional Judge is not subordinate to the District Judge for the purpose

of an appeal under this section, *Makhan Lal v Srilal*, 9 A L J 371 14 Ind Cas 172, *Chranji Lal v Emperor*, 36 All, 576 12 A L J 1105 25 I C 686 An appeal against an order of the Deputy Commissioner of Darjeeling will lie to the District Judge, *Chagnull v Jainarain*, 15 C L J 239 16 C W N 80 n, *Chathurbhuj Mahesri v Harlal*, AIR 1925 Cal 335 80 I C 858 An appeal against an order passed by a Court of Small Causes exercising insolvency jurisdiction will lie to the District Court, see sec 3 (2) *ante*, also see *Debi Prasad v Jumna Das*, 23 All, 56, *Sitharam v Vaithilinga*, 12 Mad, 472, *Sankar v Vithal*, 21 Bom 45, *Manekshah v Dadabhai*, 27 Bom, 604

As to the hearing of appeal from the District Judge's order by the Judicial Commissioner of N W F Provinces, see *Ghulam Haider v Emperor*, 73 I C 129 Under the Punjab Government Notification No 889, dated the 18th Nov 1908, the Divisional Court is the District Court Therefore, an order in the exercise of the insolvency jurisdiction by District Court is appealable to the Divisional Judge, *Mansa v Nathumal*, 3 P R 1911 29 P L R 1911 24 P W R 1911 8 I C 485 Cf *Ram Kishen v Umrao Bibi*, 80 P W R 1916 33 I C 730 An Official Receiver is not a Court subordinate to the District Court within the meaning of this section, *Allapichai v Kuppai Pichai*, 40 Mad, 752 32 M L J 449 39 I C 429

Powers of Appellate Court The appellate Court possesses all the powers of the original Court including that of granting interim protection or appointing a Receiver, *Abdul Razak v Basiruddin* 11 C L J 435 14 C W N 586 6 I C 95—referred to in 46 I C 224 (Pat) and 58 I C 677 (Mad)

Shall be final These words evidently indicate that the order of the District Judge is not open to second appeal They do not mean that the ordinary right of suit, if otherwise existing, will be taken away, *Duni Chand v Muhammad Hussan*, 22 P R 1917 40 I C 220 But under the proviso next following such an order can be interfered with by the High Court by way of revision So, it has been held that an order made in appeal by a District Judge in an insolvency proceeding directing the lower Court to take and submit additional evidence is not a final order hereunder and the High Court has power in revision to set aside that order, *Gangadhar v Sridhar* 61 I C 589 From the use of the word "final" it is not to be supposed that the provisions regarding rehearing as contained in the Civil Procedure Code will not apply or that a Court cannot review its own order under O XLVII, rr 1 2 Cf *Re Bhagwan Das*, 4 Bom, 48, *Mool Chand v Sarjoo Pershad*, 12 C W N 273 7 C L J 268 111c under the heading "Review" at p 47, *ante* Also at p 458

As an additional judge is not subordinate to the District Judge within the meaning of sec 3, an appeal against an order made by him will lie not to the District Judge but to the High Court under sub-sec (2), see *Makhanlal v Srilal*, 9 A L J 371

It should not be lost sight of that a Receiver is not a Court under this Act, therefore an order by the Court in appeal from an order of the Receiver under sec 68 is not final *Allapichai v Kuppai Pichai*, 40 Mad, 752, 39 I C 429 32 M L J 449 Cf *Muthusami v Somoo*, 39 M L J 438, 440 (1920) M W N 537

Proviso I: Power of Revision under this Section:
Under this proviso the High Court has been vested with revisional powers in respect of the orders made in appeals by the District Court For the meaning of the expression "High Court" see sec 3 (24) of the General Clauses Act (X of 1897) The reason for the introduction of this proviso is to provide a safeguard against the restrictions placed on the right of appeal under sub-section (1)—[see Select Committee's Report on the Act of 1907] The powers conferred by this section are analogous to those conferred by section 25 of the Provincial Small Cause Courts Act and wider than those conferred by sec 115 of the Civil Procedure Code, 1908 Under sec 115, the High Court can interfere only when there is a question of jurisdiction involved But under this section, as under sec 25 of the Provincial Small Cause Act, the High Court can interfere if the order under revision is not according to law, *Hari prasad v Bhagat Singh*, 36 I C 594 102 P R 191 685 P L R 1912 Under sec 115, C P Code, mere illegality of the order unless involving a question of jurisdiction will not justify the High Court to interfere, because a Court has jurisdiction to decide wrong as well as right, *Malkarjun v Narahan*, 25 Bom, 337 (34-) P C Cf also *Amir Hossein's case* 11 Cal 6 (P C), *Bala Krishen's case*, 40 Mad, 793 22 C W N 50 (P C)

The power conferred by the proviso is merely discretionary with the High Court, as is evident from the use of the word "may," but the discretion to be used in the matter is always judicial discretion and not arbitrary discretion see p 40, ante For an instance in which a time barred appeal was converted into a revision petition, see *Manguluri S. aramajja v Singhumahantu*, 39 Mad, 593 18 M L T 200 30 I C 701 For the application of sec 107 of the Government of India Act, *Vide Ibid*

The question whether a certain transfer of property has been made with "intent" to delay or defeat creditors within the meaning of sec 6 (b) is not a question of law but merely one of fact *Har Pirshad v Bhagat Singh*, 102 P R 1910 30

IC 594 Cf *Ramgopal v Shamskhaton*, 20 Cal 93 (99),
PC *Bent Ram v Kandan Lal* 26 IA 58 21 All 496, PC

Before the Act of 1907 if an insolvency petition were rejected the remedy open to the aggrieved person was by way of motion to the High Court. See *Kedar Bans v Maharani Janki* 14 CWN 143, but now there is an appeal against such an order.

Revision An order made in appeal by District Judge directing the taking of additional evidence is open to revision. *Gangadhar v Shridhar* 61 IC 589. The Appellate Court can treat an appeal as revision also when the leave contemplated by sec 5 (3) is not taken, *Maung Po Mya v Maung Po Kyin* 8 Bur LT 282 30 IC 943. But see *Kallukutty Parambath v Putthen Pectikkal* 49 MLJ 595 22 LW 542 AIR 1926 Mad 123 91 IC 144 in which a revision application was rejected on the ground *inter alia* that an appeal lay in the matter. An order of the District Judge refusing to take action under secs 22 and 69 is not open to revision. *Gujar v Barkat* 56 IC 744 Cf *Bhagwant v Sanwal Das* 19 ALJ 701 61 IC 802.

Proviso II Second Appeal This proviso is new, and gives a right of second appeal from the decision of the District Court in a matter decided under sec 4 of this Act. See *Foolkumari v Khirud Chandra* 31 CWN 507 AIR 1927 Cal 474 102 IC 115. But such a second appeal is allowable only on the grounds mentioned in sec 100 of C P Code 1908. Thus a second appeal will lie against an order under sec 53 *supra* but only on a point of law. *Seth Sheolal v Giridharilal* AIR 1924 Nag 361 8 IC 140. But the right of second appeal has been denied in such a case in *Ilahi Jan v Hari Kishen* 67 IC 887 (Lah) because a case decided under sec 53 may not properly fall under sec 4. *Budha Mal v Official Receiver Lahore* AIR 1930 Lah 122. Where the consideration for a mortgage consisted of two main items the second item being of Rs 3000/ kept in deposit for payment to a previous mortgagee and the previous mortgage deed was in possession of the second mortgagee and the discharge of the previous mortgage was admitted by the first mortgagee the lower appellate Court upheld the annulment of the mortgage under this section remarking that there was an initial presumption of collusion and hence the proof was insufficient overlooking the mortgagee's own evidence. *held* that the finding was vitiated by an error of law. *Ibid*. The value of the appeal (even if over 5000) will not affect the question of the maintainability of the second appeal. *Foolkumari v Khirud Chandra supra*. An order enlarging the time limit for an application for discharge under sec 7 *ante* is not a decision under sec 4 of the Act and consequently not open to a second

appeal, *Sambamurthi Aiyar v Ramakrishna*, 52 Mad 337 55 M L J 837 29 L W 60 A I R 1929 Mad 43 114 I C 847 As to what matters fall within the scope of sec 4, so as to be open to second appeal, comp cases at p 473, *infra* Read there also the comment on Ramesam J's view in 49 M L J 393

Sub-sec. (2) Under this sub-section, an appeal from the decision or order of the District Court lies to the High Court, but subject to the following conditions —

- (a) Only such decisions and orders are appealable as are specified in Schedule I
- (b) The decision or order in question must be in an original case heard by the District Court and must not be in the course of an appeal from an order of a subordinate Court

The language of this sub section is somewhat faulty. In the first part of the sub section we have both the words "decision" or "order", but in the latter part we have only the word "order" and not "decision". This looseness of expression is liable to an erroneous interpretation, namely, that the only *decision* that a subordinate Court is capable of coming to is one under sec 4 and that the case of that decision has been provided for in *proviso* II and that this sub-section (2) contemplates only the orders made by the Subordinate Court. But this cannot be, because Schedule I shows that an order under sec 54 is also a decision. From the aforesaid omission of the word "decision" it should not also be contended that the exclusion implied in the latter part of the section, is restricted only to an "order", so that there may be a second appeal from the *decision* of a Subordinate Court though there is none from an order made by it. Such a view is wholly inconsistent with sub sec (1) which says that an appellate order of the District Court is final subject to *proviso* II. But it receives support from the omission of the word "decision" in the last line but one in the first paragraph of sub sec (1). This anomaly has been occasioned by the careless use of the new word "decision" in some places and not in others.

An appeal lies under sec 75 (2) against a decision on the question of title by the Insolvency Court, *Shukri Prosad v Aziz Ali* 44 All, 71 19 A L J 862 93 I C 601

Sub-sec (3) : Leave Original orders of the District Court other than those mentioned in Schedule I are not appealable as a matter of right. But they may be appealed against provided previous leave from the District Court or the High Court is obtained for the purpose. Leave will not be given as a matter of course. The Court would refuse leave in unimportant cases where no question of law is involved, *Re Campbell*, (1884) 14 Q B D 12, or

When the District Court should or should not grant leave

where no doubtful question of law is raised, *Ex parte Edwards*, (1884) 14 Q B D 415, *Ex parte Moss*, (1884) 14 Q B D 310 (318). In *Ex parte East & West India Dock Co*, (1881) 17 Ch D 759, leave was refused on the ground that the appeal would be from the discretion of the Court. A District Court ought to give leave in cases which involve important questions of law [*Re Armstrong* (1886) 17 Q B D 521]. Leave should also be given by the District Judge when the order complained of is one finally deciding a question in controversy between the parties, *Arman Saidar v Satkhira Jt Stock Co*, 18 CLJ 564 20 IC 273. The statute does not provide that leave may be granted on questions of fact, nor does it provide that the District Court should not grant leave on questions of fact *Shibjee Shah v Hiralal* AIR 1928 Pat 23 104 IC 613. Where the question decided is likely to affect a large community, leave should be granted, see *Ex parte White*, (1871) 6 Ch App 397 (405). An order giving or refusing leave is not however appealable, *Loue v Esdaile*, (1891) AC 210. Cf *Pale v Bright*, (1892) 1 QB 609, *In re Everson*, (1904) 2 KB 619. The order refusing leave to appeal is discretionary with the Court and there is no right of appeal against such a discretionary order *Madhava Aiyar v Mathura* 5 LW 168 21 MLJ 77 38 IC 818. Leave to appeal on an order under sec 10 (2) is in the discretion of the Court *Shibjee Shah v Hira Lal*, AIR 1928 Pat 23 104 IC 613 and should be granted in a case where the insolvent was misled by the Court's order, *J H Gee v Shib Narain* AIR 1929 Pat 184 118 IC 332. The time spent in obtaining leave should not be deducted from the period of limitation for High Court appeal, see 49 MLJ 8 (notes).

The special leave mentioned in this sub section is obligatory. *Mul Chand v Murari Lal* 36 All 8 11 ALJ 979 21 IC 702. So, in respect of decisions and orders not covered by Schedule I there is no right of appeal unless special leave is first obtained from the District Court or the High Court. Thus, no appeal will lie from an order of dismissal of the insolvency petition except with the leave of the District Court or the High Court *Ramanathan v M I & Co Firm - Bur* LT 53 - LBR 257 24 IC 418. Similarly leave is an essential pre requisite for filing an appeal to the High Court against an order of the District Judge disallowing the insolvent's objections to the sale of occupancy rights in certain lands *Thilur Singh v Ganga Singh* 9 Lah LJ 257 AIR 1927 Pat 424 10 IC 6. Under this section the High Court has concurrent jurisdiction with the District Judge to grant leave to appeal. So the High Court is competent to grant leave notwithstanding the fact that leave has

Grant of leave by the High Court

refused by the District Judge, *Madhu Sudhan v Parbati*, 19 C W N 769 29 I C 406, see also *In re Armstrong*, (1886) 17 Q B D, 521 (527), *Jugal Kishore v Ishar Das*, 63 P R 1919 51 I C 695. It seems that for a leave to appeal the party should resort to the District Court in the first instance, Cf (1884) 1 Mor 249. When the High Court has granted leave to appeal there is no necessity for further hearing of the appeal under O XLI, r 11 of the C P Code, see *Madhu Sudhan v Parbati*, 19 C W N 760 29 I C 406. But see *Thakar Singh v Ganga Singh*, 9 L L J 257 A I R 1927 Lah 424 (2), in which it has been held that sanction cannot be deemed to have been granted by mere admitting an appeal to a hearing. It has however recently been held by the Lahore High Court

that where in the memorandum of appeal a prayer for leave to appeal was made but the motion Bench admitted the appeal without specifically stating that they granted leave to appeal, there was substantial compliance with the provisions of this section, and the appeal must be held to have been instituted with the leave of the Court, *Ram Chand v Mohra Shah*, 11 Lah L J 198 A I R 1929 Lah 622 119 I C 427, *Jai Mal v Chanan Mal*, A I R 1928 Lah 734 115 I C 475, *Ganesh Das v Khilanda Ram*, A I R 1929 Lah 636 119 I C 753. The Patna High Court also is of opinion that the admission of an appeal may, under proper circumstances amount to the granting of leave, see *Gopal Ram v Magri Ram*, *infra*. Where an order is appealable only by leave of the District Court or the High Court, the memorandum of appeal should always be accompanied by a petition for leave to appeal and it should be made clear to the Judge sitting to receive petition that the appeal is not prosecuted as one which lies as of right, *Balli v Nand Lal*, 33 I C 773 (774), (All) Cf *Mulchand v Murarilal*, 36 All 8 11 A L J 979 21 I C 702. Leave should not be granted in a case where no appeal lies leave wrongly granted cannot however create a right of appeal which has not otherwise been conferred by the Act, *Saklat Ali v Radha Mohan*, 41 All, 243 (245). The real import of this decision is not very clear. Under sub section (3), the orders are appealable subject to the leave of the Court, but this Allahabad case seems to suggest that the granting of the leave depends upon the appealability of the order. This view will however receive support from certain observations (practically by way of obiter) in *Ramesh Chandra v Charu Chandra*, 34 C W N 445, to the effect that in deciding the question as to whether an appeal should or should not be held maintainable even though the leave of the Court has been obtained hereunder, the provisions of the C P Code may be looked into as a guide for the determination of the question. It has been said in this

case that the above view was taken also in *Munnu Lal v Hunj Behan*, 44 All, 605. But from a reference to *Munnu Lal's* case, it appears that the Allahabad High Court did not go the length of saying that a matter not appealable under the C P Code will not become appealable by leave. Their Lordships simply observed that in considering an appeal from an order of review passed by the Insolvency Court the High Court should be guided by the principles of O XLVII, r 7 of the C P Code. It is not however very clear when the leave is to be granted and when not. In *Monmohan v Hemanta*, 23 C L J, 55, (side at p 31-) a doubt was expressed as to whether the High Court can grant leave to appeal against an order calling upon the insolvent to show cause under old s 70 why he should not be convicted. Leave to appeal may be obtained even after the filing of the appeal and it may take effect retrospectively, *Elliot v Subbiah*, 50 Mad 815 26 L W 248 53 M L J 742 (1928) M W N 9 A I R 1927 Mad 869 10, I C 138. Such leave can be granted even at the final hearing of the appeal to take effect retrospectively from the date of its institution, *Horomohun v Mohan Das*, 39 C L J 432 A I R 1924 Cal 849. An appellate

When the leave is to be obtained Court can after hearing the entire case consider that sufficient case has been made out by the appellant for obtaining

leave to appeal and thereby grant the leave, *Gopal Ram v Magni Ram*, 7 Pat 375 A I R 1928 Pat 338 107 I C 830. A direction that notice of appeal should issue amounts to leave to appeal, *Ibid*. An appeal without the necessary leave may be treated as a revision, *Maung Po Mya v Maung Po Kyin*, 8 Bur, L T 282 30 I C 943.

Appeals All orders or decisions of a Subordinate Court invested with insolvency jurisdiction under sec 3, are open to appeal, see sub-section (1). Also see *Vaikunta Prabhu v Mordin Sahib*, 15 Mad, 89, *Komarsami v Govinda* 11 Mad, 136. *Shankar v Vilhal*, 21 Bom, 45, *Menekshah v Dadabhai* 27 Bom, 604. Such an appeal lies to the District Court, Cf *Chug Mull v Jairam*, 15 C L J 239, 16 C W N 80n. *Sitharama v Pythilingh*, 12 Mad, 472. See also the cases under the heading 'aggrieved person'. An appeal will also lie even when the order of the Subordinate Court is an order confirming that of the Receiver. Such an order is virtually an original order of the Court. *Abdul Aziz v Khurod*, 41 I C 411, see also *Alla Pichai v Kuppai Pichai*, 39 I C 429 32 M L J 449. The jurisdiction of the District Court to hear appeals against the decisions or orders of a Subordinate Court is not dependent upon either the value of the decree of which the order in insolvency is or the amount of the debts entered in the statement filed or the amount of the

refused by the District Judge, *Madhu Sudhan v Parbati*, 19 C W N 769 29 I C 406, see also *In re Armstrong*, (1886) 17 Q B D, 521 (527), *Jugal Kishore v Ishar Das*, 63 P R 1919 31 I C 695. It seems that for a leave to appeal, the party should resort to the District Court in the first instance, Cf (1884) 1 Mor 249. When the High Court has granted leave to appeal there is no necessity for further hearing of the appeal under O XLI, r 11 of the C P Code, see *Madhu Sudhan v Parbati*, 19 C W N 760 29 I C 406. But see *Thakar Singh v Ganga Singh*, 9 L L J 257 A I R 1927 Lah 424 (2), in which it has been held that sanction cannot be deemed to have been granted by mere admitting an appeal to a hearing. It has however recently been held by the Lahore High Court that where in the memorandum of

Leave by implication appeal a prayer for leave to appeal was made but the motion Bench admitted the appeal without specifically stating that they granted leave to appeal, there was substantial compliance with the provisions of this section, and the appeal must be held to have been instituted with the leave of the Court, *Ram Chand v Mohra Shah*, 11 Lah L J 198 A I R 1929 Lah 622 119 I C 427. *Jai Mal v Chanan Mal*, A I R 1928 Lah 734 115 I C 473. *Ganesh Das v Khulanda Ram*, A I R 1929 Lah 636 119 I C 753. The Patna High Court also is of opinion that the admission of an appeal may, under proper circumstances, amount to the granting of leave, see *Gopal Ram v Magri Ram*, *infra*. Where an order is appealable only by leave of the District Court or the High Court, the memorandum of appeal should always be accompanied by a petition for leave to appeal and it should be made clear to the Judge sitting to receive petition that the appeal is not prosecuted as one which lies as of right, *Balli v Nand Lal*, 33 I C 773 (774), (All) Cf *Mulchand v Muralilal*, 36 All 8 11 A L J 979 21 I C 70. Leave should not be granted in a case where no appeal lies. Leave wrongly granted cannot however create a right of appeal which has not otherwise been conferred by the Act, *Saklajal Ali v Radha Mohan*, 41 All, 243 (245). The real import of this decision is not very clear. Under sub section (3), the orders are appealable subject to the leave of the Court, but this Allahabad case seems to suggest that the granting of the leave depends upon the appealability of the order. This view will however receive support from certain observations (practically by way of obiter) in *Ramesh Chandra v Charu Chandra* 4 C W N 445, to the effect that in deciding the question as to whether an appeal should or should not be held maintainable even though the leave of the Court has been obtained hereunder, the provisions of the C P Code may be looked into as a guide for the determination of the question.

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When the leave is to be obtained Court can after hearing the entire case consider that sufficient case has been made out by the appellant for obtaining leave to appeal and thereby grant the leave, *Gopal Ram v Magni Ram*, 7 Pat 375 A I R 1928 Pat 338 107 I C 830. A direction that notice of appeal should issue amounts to leave to appeal, *Ibid*. An appeal without the necessary leave may be treated as a revision, *Maung Po Mya v Maung Po Kyn*, 8 Bur, L T 282 30 I C 943.

Appeals All orders or decisions of a Subordinate Court invested with insolvency jurisdiction under sec 3, are open to appeal, see sub-section (1). Also see *Vaikunta Prabhu v Moidin Sahib* 15 Mad, 89, *Komarsami v Govinda*, 11 Mad, 136. *Shankar v Vithal*, 21 Bom, 45, *Menekshah v Dadabhai*, 27 Bom 604. Such an appeal lies to the District Court, Cf *Chug Mull v Jatram*, 15 C L J 239, 16 C W N 80. *Sitharama v Iythilingh* 12 Mad, 472. See also the cases under the heading "aggrieved person". An appeal will also lie even when the order of the Subordinate Court is an order confirming that of the Receiver. Such an order is virtually an original order of the Court, *Abdul Aziz v Khirad*, 41 I C 411, see also *Alla Pichai v Kuppari Pichai*, 39 I C 429 32 M L J 449. The jurisdiction of the District Court to hear appeals against the decisions or orders of a Subordinate Court is not dependant upon either the value of the decree in respect of which the order in insolvency was obtained or the amount of the debts entered in the Schedule of debts filed by the applicant.

for a declaration of insolvency, *Debiprosad v Jamna Das*, 23 All 56 See *Fool Kumari's* case cited at p 465, ante The order of District Court upon such appeal is final [Sub-sec (1)] A decision under sec 4 is appealable to the High Court The Calcutta High Court has held that if a decision by a Court is open to appeal, its refusal to pass a decision is also appealable, *Nayantara v Sambhunath*, 52 Cal , 662 89 I C 761 For our comments on this case vide at p 42, ante Under *proviso II*, a second appeal lies to the High Court in respect of a decision of the Subordinate Court under sec 4 of the Act As regards appeals from *original* (not appellate) decisions or orders of the District Court, they lie to the High Court In appealing to the High Court no special leave will be necessary when the decisions and orders in question are such as are mentioned in Schedule I, otherwise special leave will be necessary Before the amendment of sec 70 effected in 1926 it was held that an appeal would lie from an order of conviction under sec 60 but no appeal lay under sec 75(2) against an order calling upon the insolvent under sec 73 to show cause why charges should not be framed against him, *Monmohan Roy v Hemanto*, 23 CLJ 55 334 I C 777 If in a matter the right of appeal subsisted before this Act came in force, that right will not be destroyed by the operation of this Act Cf *Salimmana v Valli* 21 MLJ 764 10 MLT 78 2 MWN 99

In dealing with appeals under this section the provisions of the C P Code ought to guide the Court, *Munnulal v Kurj Beharilal*, 44 All , 605 20 ALJ 517 AIR 1922 All , 206 67 I C 317 When an order is purported to be made under a provision of the C P Code, it will be appealable only if it falls within the scope of O XLIII, r 1 of that Code, *Abdul Gaffer v Official Assignee*, 3 Rangoon, 313

Abatement of appeal As to *abatement* of appeal on the death of the respondent see, *Rameshwar v Bisheshwar* 7 All , 734 The appeal will not abate by reason of non substitution of the heirs of a deceased creditor respondent, *Thakar Singh v Ganga Singh*, 9 LLJ 257 AIR 1927 Lah 424(2) As to the effect of death of the insolvent, vide notes at p 112, ante

The order of the appellate Court under this section read with sec 28 (7) will relate back to, and take effect from the date of the presentation of the petition of insolvency, *Abdul Razak v Basiruddin*, 11 CLJ 435 (437) 14 CWN 586

Return of Memorandum when appeal presented to wrong Court By reason of the provisions of sec 5, ante it seems, that when an appeal is filed in a wrong Court, the memorandum can be returned for presentation to the proper Court Cf *Chutturbhuj Mahesri v Harlal Agarwala*, AI 1925 Cal 335 80 I C 858

Notice of appeal Notice of the appeal should be given to parties likely to be affected by the reversal of the order appealed against, *Trasi Datta v Parameshtaya*, 39 Mad, 74 29 M L J 451 27 I C 144. When an appeal is preferred by the insolvent against the dismissal of his application for adjudication, notice of such appeal should be served on a substantial number of creditors, *Chirunji Lal v Ajodhya Prasad*, 37 I C 391 (All). As to the effect of not serving the necessary notice, vide under the next heading "Parties to appeal". Cf. *Khanna v Salem Raj*, 51 I C 935 (Lah). A debtor who gets notice of hearing served on his authorised agent cannot complain that he did not also receive a similar notice, *Kalyanji Singh Bhai v Bank of Madras*, 39 Mad, 693 29 M L J 788 3 L W 13 (1926) M W N 12 31 I C 583. A direction that notice of appeal should issue amounts to leave to appeal, *Gopal Ram v Magni Ram*, 7 Pat 375 A I R 1928 Pat 348 107 I C 830.

Parties to Appeal In an appeal against an order passed in an insolvency proceeding, only the parties affected by the order are necessary parties and are entitled to notice, *Trasi Datta v Parameshtaya*, 39 Mad, 74 29 M L J 451 27 I C 144. In an appeal by a debtor against an order dismissing an application for adjudication notice of the appeal should be given to a substantial number of creditors to enable them to represent their interests as respondents, *Chirunji Lal v Ajodhya Prasad*, 37 I C 391. In appeals against an order of adjudication, notice of the appeal should be served on the Official Assignee, *Khem Karandas v Huribux* 20 C W N 884 A I R 1925 Cal 1215 89 I C 584, following *Re Webber Ex parte Webber*, L R 24 Q B D 313, but according to the practice prevailing in the Punjab the receiver is not considered a necessary party in an appeal against an adjudication order, *Firm of Moti Ram v Keral Ram*, 9 Lah L J 450 A I R 1928 Lah 202 1/5 I C 569. Non impleading the receiver as a party respondent will not vitiate an appellate order if there be no question of prejudice to him, *Narasiman v Hanumantha*, A I R 1922 Mad 439 (1922) M W N 717 7 I C 572. But see *Khanna v Salem Raj* 51 I C 935 (Lah). An appeal by the insolvent against an order refusing to release a house for his residence without impleading the Receiver as party is incompetent, *Ghulam Mahomed v Karta Ram*, 57 I C 971 (Lah). In an appeal by the creditor against the order of adjudication, the insolvent is a necessary party to the appeal, *Chhotubhai Bhimbhai v Daji Bhai* 26 Bom L R 412 A I R 1924 Bom 472 80 I C 482. In an appeal against the order of the District Judge confirming a sale effected in the insolvency proceedings, the auction purchaser and the Receiver are necessary parties, and omission to implead them is fatal *Tarlok Datta v Joti Ram*, A I R 1923 Lah 58 68 I C 716. See also *Khanna v Salem*

Raj, 51 I C 935 (Lah); but see *Jugal Kishore v Ishar Das* 63 P R 1919 51 I C 695. It is not to be supposed that all the creditors of the insolvent whether named or unnamed in the petition and whether they have appeared in the original proceedings or not are necessary parties and entitled to notice. *In re Debtor*, (1901) 2 K B 354 70 L J K B 699. So it has been held by the Calcutta High Court that it is necessary for the appellant, who is the petitioner for insolvency, to add as a party respondent, the creditor who is mentioned in the petition but who did not appear in the original Court to oppose the application, *Samiruddin v Kadumovi*, 12 C L J 445 13 C W N 244. In an appeal by one creditor, the other creditors need not be joined as party respondents, *E I Cigarette Co v Anando Mohan* 24 C W N 401 58 I C 10. In an appeal from an order of a District Judge dismissing a claim by a stranger to money ordered to be paid to the Receiver, the creditors are not necessary parties, *Munshi Ram v Ghulam Dastgir* A I R 1928 Lah 423 107 I C 400. Non service of notice upon the heirs of a deceased scheduled creditor would not by itself render the proceeding before the appellate Court incompetent, *Gokul Chandra v Radha Goinda*, 44 C L J 108 A I R 1926 Cal 1210 97 I C 1013, also *Thakar Singh's case* (at p 470).

Applicability of the provisions of the C. P. Code to appeals hereunder When an appeal is preferred under this section, all or any of the provisions of O XLI of C P Code may be made applicable to such an appeal, if they be not inconsistent with the provisions of this Act; see *Alagappa v Chockalingam* 41 Mad, 904, F B 84 I C 203, so the appellate Court can ask the appellant to furnish security for costs under O XLI r 10 of the Code of Civil Procedure, see *Lakshmi Das v Raj Kishore*, 43 Cal, 243 20 C W N 554. But see *Sesha Aiyar v Nagarathna Lala*, 27 Mad, 121. A respondent can avail himself of the provisions of O XLI, r 22 (of C P Code) to file a memorandum of cross-objection when an appeal is preferred against him, see *Alagappa v Chockalingam* 41 Mad, 904 F B 84 I C 203. As to abatement of appeals, vide notes and cases at p 470, ante.

An appeal lies to the High Court at the instance of a creditor against an order of adjudication, passed on the petition of another creditor if the Court declined to add the former as a party, *Muthu Karuppan v Muthuraman*, (1914) M W N 599 26 I C 282.

Court Fees For Court fees payable on the memorandum of an appeal from an order of the Insolvency Court, vide Sch II, Art 11, of the Court Fees Act, the order being one not having the force of a decree within the meaning of that

Article Though the provisions of the C P Code apply to insolvency cases still the effect thereof will not be to render the definition of "decree" in sec 2, C P Code, applicable to an adjudication by the Insolvency Court, which can only be a decision or an order (vide sec 75), inasmuch as the C P Code will never override a provision of this Act. Of course, under sec 78 of this Act, a decision under sec 4 will be a *decree*, but that is only for the purposes of sec 12 of the Limitation Act and not for those of Sch II, Art 11 of the Court Fees Act. An Insolvency appeal is always a miscellaneous appeal (i.e., "an appeal from an order"), even when the decision appealed against is one under sec 4 of this Act. Cf *Fool Kumari v Khurod Chandra* 31 CWN 502 AIR 1927 474 102 IC 115. From the point of view of Court fees it is more advantageous to the litigant to utilise the provisions of this Act than to have recourse to the ordinary Civil Court. The Allahabad decision of *Batynath Das v Balmukund* 47 All 98 22 ALJ 881 82 IC 321, on the said Art 11, may be consulted in this connection with benefit.

Orders appealable : A decision on a question whether an insolvent three years before the insolvency sold his property merely with intent to defraud and delay his creditors is a decision on a question of title within the meaning of sec 4 and is appealable hereunder, *Shikri Prasad v Aziz Ali* 19 ALJ 862 63 IC 601. Similarly there is a question of title when the point decided is as to the validity of consent by heir to a Moslem will and therefore an appeal lies *Kalicharan v Mohammad Jamil* [1930] ALJ 588 122 IC 762. An appeal lies where the creditor's application for disciplinary action against the debtor is dismissed without inquiry, without receiving any report from the Receiver and without assigning any reason *Karuthan Chettiar v Raman* 45 MLJ 804 18 LW 837 (1923) MWN 88 79 IC 340. An appeal lies against the order whereby the Court without adjudicating upon the claim of a third person directs the sale of the property subject to such claim under sec 4 *Nayanlara v Sambhunath*, 52 Cal 662 AIR 1925 Cal 932 89 IC 61. Where property is seized by a receiver as belonging to an insolvent and a claim is preferred by a third party to such property and the claim is allowed an appeal lies hereunder *Ghani Mahomed v Dinanath*, AIR 1928 Lah 556 108 IC 602. Similarly, where a Receiver sells a stranger's property as the property of the insolvent, and such stranger applies for rectification of this act of the receiver under sec 68 but the Court dismisses his application as time barred, there is an appeal because such a matter is covered by sec 4. See 107 IC 467 cited under the heading "Appeal," at p 433, *ante*. Where an order was passed by the District Judge directing moneys to be paid to the official

Receiver and a third party put in a claim petition, which was dismissed, it was held that the order of dismissal amounted to a disposal on a question of title within the meaning of s 4 and was consequently appealable, *Munshi Ram v Ghulam, Dastgir* AIR 1928 Lah 428 107 IC 400 According to Ramesam J (in *Kallukutty Parambath v Puthen Peetikakkal*, 22 LW 452 49 MLJ 595 91 IC 144), the words "of any nature whatever" in sec 4 of the Act show that all questions arising in the course of insolvency proceedings may be dealt with by the Court (under that section) for the purpose of doing complete justice, and in such a case a second appeal lies to the High Court on a question of law. If the above proposition as enunciated by the learned Judge, were correct, there would be a second appeal almost in every insolvency matter involving a point of law,—a result, hardly contemplated by the Legislature. An appeal lies against an order admitting a non provable debt in proof, *Siva Subramania v Teethiappa* 47 Mad 120 45 MLJ 166 (1923) MWN 895 18 LW 636 75 IC 572. An appeal lies to the High Court under sec 75 (3) from an order granting a review of judgment, but such appeals should be limited by the provisions of O XLVII, C P Code, *Munnulal v Kunj Behari*, 44 All 605 20 ALJ 517 AIR 1922 All 206 67 IC 317. An appeal lies from an order passed under sec 37 of the Act, *Shoidan Lachmi Narain v Bahadur Chand*, AIR 1927 Lah 914 100 IC 137, as well as from an order appointing a special Receiver in supersession of the Official Receiver, *Official Receiver, Tanjore v Nataraja Sastrigal*, 46 Mad 405 44 MLJ 251 (1923) MWN 212 AIR 1923 Mad 355 72 IC 225.

Orders not appealable except without leave. No appeal lies from an order of dismissal of an insolvency petition made on the ground of fraud etc except with the leave of the District Court or the High Court, *Ramanathan v M L Firm* 7 Bur LT 53 7 LBR 257 24 IC 438. No appeal lies from an order rejecting an application for extension of time made under sec 27 (2), *Re Ganga Prasad*, 89 IC 959 (Oudh). It is doubtful whether an order refusing to take action under sec 53 or sec 54A is open to appeal, *Bhagwant v Munim Khan* 6 NLR 146 8 IC 1115. Vide also at pp 42 & 359. No appeal lies against an order of District Judge refusing to take action under ss 22 and 69, *Gujar Shah v Barkat Ali*, 1 Lah 213 56 IC 744, *Bhagwant v Sanjal Das*, 19 ALJ 701 61 IC 802. See *Dula Singh v Attar Singh*, 95 PLR 1917 152 PWR 1917 42 IC 287, *Iyappa Nainar v Manicka Isarn*, 40 Mad. 60 27 IC 241, followed in *Virchand v Bulaki Das* 55 IC 717 (Nag). Cf *Manmohan v Hemanta*, 21 C1J 50 34 IC 777. No appeal lies from an order annulling an

adjudication under the provisions of sec 43 of the Act, without the leave of the Court, *Shoidan Lachmi Narain v Bahadur Chand*, AIR 1927 Lah 914 100 IC 117, *Gopal Ram v Magni Ram*, 7 Pat 375 AIR 1928 Pat 318 107 IC 830. An appeal from an order under sec 56(3) is likewise subject to the leave of the District Court or the High Court, *Nilmom Chaudhury v Durgra Charan* 22 CWN 704 46 IC 377. No appeal lies without leave from an order refusing to appoint a receiver, *Horomohun v Mohan Das*, 39 CLJ 432 AIR 1924 Cal 849 83 IC 360.

Appeal heard without Jurisdiction. Where no appeal lies to the District Court, if the District Court hears the appeal, the High Court can set aside the appellate order passed by the District Court, *Dula Singh v Attar Singh*, 95 PLR 1917 152 PWR 1917 42 IC 287.

Effect of non-service of notice of appeal on creditors' heirs. The appeal is not rendered incompetent by such non-service, but the heirs of the deceased creditor, if not brought on the record, will have the right to re open the proceedings. *Gokul Chandra v Radha Goinda* 44 CLJ 108 AIR 1926 Cal 1210 97 IC 1013 (cited at p 42) also *Thakar Singh's* case, cited at p 40.

Privy Council Appeal. See p 50, *ante*. There is no provision in the Act as regards appeals to the Privy Council. So it has been maintained that this Act does not interfere with any right of appeal to the Privy Council, that may otherwise exist, see *Bombay B T Co v Dorabji*, 27 Bom, 415. So where an application for insolvency is dismissed under sec 25 of this Act, and an appeal is also dismissed in the High Court under O XLI, r 11, an appeal to the Privy Council will be competent, see *Chatrapat Singh v Kharag Singh*, 40 Cal, 685 17 CWN 752 17 CLJ 547. For the application of Cl 39 of the Letters Patent for the purpose of an appeal to Privy Council see *Annamalai Chetty v Official Assignee*, AIR 925 Mad 243.

Appeal may be continued after annulment of adjudication. An appeal filed by an insolvent in a civil suit can be continued after the annulment of his adjudication, *Ramchandra v Shripati* 31 Bom LR 357 AIR 1929 Bom 202 118 IC 252.

Sub-sec. (4): Limitation. The periods of limitation for appeals to the District Court and to the High Court under this section are respectively 30 and 90 days. These are in fact the periods of limitation for all ordinary appeals in civil matters. In computing the period of ninety days the appellant cannot claim to deduct the time spent in obtaining

leave to appeal from the District Court, 39 M L J 8 (n) If the appeal is filed in time, the mere fact that an application for leave to appeal was not filed in time does not render the appeal out of time, *Ananthanarayana v Rama Subba*, 47 Mad, 673 18 L W 857 A I R 1924 Mad 345 79 I C 395

This Act is no doubt a *special* law within the meaning of sec 29 of the Limitation Act (IX of 1908) as amended by Act X of 1922 Therefore, the special rules of computation contained in the said Act though they were not (before 1922) applicable to Insolvency cases may now be available in computing the periods of 30 and 90 days For the old cases see *Kalimuddin Molla v Sahiluddin*, 47 Cal, 30, F B 30 C L J 433 3 C W N 4 *Khagendra v Bamani*, 24 C W N 29 *Contra Waryam Singh v Madhava*, 88 P W R 1918 89 P R 1918 8 P L R 1918 46 I C 588 In some of the early cases there was a good deal of controversy as to the application of secs 5 and 12 of the Limitation Act in computing the periods of limitation under this Act, see *Dropadi v Hara Lal*, 34 All, 496, F B 10 A L J 3 16 I C 149, *Ramkishan v Umra Bibi*, 33 I C 730 80 P W R 1916, *Thakur Prasad v Punno Lal*, 35 All, 410, *Gangaram v Ram Chandra* 20 I C 259 sc 9 V L R 91, *Chavadi Ramasami v Venkateswara*, 42 Mad 13 35 M L J 531 48 I C 952, *Munjuluri v Singumahanu* 39 Mad, 593 18 M L T 200 30 I C 703, *Jugal Kishore v Gur Narain*, 33 All, 738 8 A L J 833 11 I C 19, *Sivaramiah v Bhujanga* 39 Mad, 596, *Kapparthi v Arach* 41 Mad 169 (F B) 33 M L J 566 7 L W 443 44 I C 850 But under this present Act there is no room for such a controversy as in sec 78 we have got a new provision declaring that secs 5 and 12 of the Limitation Act are applicable to appeals and applications under this Act, *vide infra* It should be noticed that hereunder the other provisions of the Limitation Act (excepting secs 5 and 12) do not apply to insolvency matters So it was held (before 1922) that sec 14 of the I L Act did not apply to insolvency proceedings, see *Duraisami v Menakshi* 25 I C 610 16 M I T 246 (1914) M W N 831, also Cf *Frasi De-a v Parameshwara*, 39 Mad, 74 27 I C 144 29 M L J 451 But now sec 29 as amended in 1922 has rendered sec 14 secs 9 18 & sec 22 of the Limitation Act applicable to such cases When the last day of limitation for an appeal (i e the 30th or 90th day) is a *dies non*, it may be excluded under sec 10 of the General Clauses Act (and now also under sec 4 of I L A) and the limitation is extended up till the re-opening day, *Rama Saram v Venkateswara*, 42 Mad, 13 35 M L J 531 48 I C 952 An appeal against an order affecting the estate of an insolvent even if presented out of time can be treated as a revision petition and the High Court can interfere with such

an order under sec 107 of the Government of India Act, if it is clearly illegal and interference is necessary in the interests of justice, *Munjuluri v Singumahanli*, 39 Mad , 493 , 50 I C 703 (*supra*)

PART VII.

MISCELLANEOUS

76. [§ 49] The costs of any proceeding under this Act, including the costs of maintaining a debtor in the civil prison, shall subject to any rules made under this Act, be in the discretion of the Court in which the proceeding is had

Costs

This is section 49 of the repealed Act and is analogous to sec 109 of the Bankruptcy Act, 1914

Reason of this Rule A clause of this description is necessary in view of the fact that whereas the Code of Civil Procedure requires the deposit of diet money in the case of detention in the civil prison it is not desirable that a creditor merely by reason of his position as such should be saddled with such charges "We propose to allow the Courts a full discretion in the matter of awarding costs subject only to Rules made in this behalf" *Select Committee Report on Act III of 1907* *Vide* clauses 31 32 of the Insolvency Rules framed by the Calcutta High Court , clause xxii of the Madras High Court Rules and clause xxvii of the Bombay High Court Rules

Costs In awarding costs to a party, the Court should ordinarily follow the general rule that costs follow the event *Ghanasham v Moralla* 18 Bom , 474 The Insolvency Court will not of course depart from this general rule only it will use greater discretion in the matter of costs Under the Civil Procedure Code the cost of maintaining the debtor in the Civil prison is to be borne by the executing creditor but under this Act a person will not be liable for such costs by reason of his being a mere creditor of the insolvent The discretion to be used in the matter of costs in an insolvency proceeding is how ever subject to any rules made under this Act (*vide* under the last heading) , and the discretion referred to in the section must be discretion of the Court in which the proceeding is had Under the English law a petitioning creditor is allowed his

costs out of the insolvent estate, if an order of adjudication is made *Young v Thomas*, 2 Ch 134. Ordinarily, it will not be proper to make an order for costs personally against an undischarged insolvent, [see *Ex parte Baum*, (1878) 7 Ch D 719] but such an order, if made, will not be absolutely illegal, *Ex parte Castle Mail Packets Co*, (1886) 18 Q B D 154. If the Receiver brings an unsuccessful motion, he is to bear the costs of the opposite party himself and the order for costs should not be directed to be limited to the assets in his hands, otherwise, the result will be that a party may ultimately be mulcted in costs for faults for which he is not in any way responsible, *Re Suresh Ch Guyee*, 23 C W N 431. So, before starting any proceeding, the receiver should obtain an indemnity from the persons in whose interest the motion is sought to be laid *Ibid*. Where the receiver continues a suit instituted by the insolvent by virtue of his power under sec 59 (d), he will not be made personally liable for the costs of the suit unless his conduct was reckless and frivolous, *Abdul Rahman v Shaw Wallace & Co* A I R 1925 Mad 736 92 I C 620. *Vide* notes at p 394, ante.

Where there has been no misconduct, omission or neglect (which would induce the Court to refuse costs) on the part of one who comes to Court for enforcing a legal right, the Court has no discretion but must grant him his costs, *Kuppusami v Zemindar of Kalahasti*, 27 Mad, 341. It should be noted that this Act gives a wider discretion in the matter of costs than that given by sec 35 of the C P Code, 1908. The Appellate Court cannot interfere with this discretion unless based on wrong principles or misapprehension of facts, *Re Hare*, (1901) 2 K B 290.

As to how the order for costs under this section is to be enforced it seems that such an order can be executed under the provisions of the Civil Procedure Code. In a case before the Calcutta High Court in the exercise of its insolvency jurisdiction it has been held that an order for costs is a judgment and can be enforced by means of a suit based upon such judgment *Annada Prosad v Nobo Kishore*, 33 Cal, 560 9 C W N 932.

77. [§ 50] All Courts having jurisdiction in insolvency and the officers of such Courts respectively shall severally act in aid of and be

Courts to be auxiliary to each other

auxiliary to each other in all matters of insolvency and in order of a Court seeking aid with a request to another of the said Courts shall be deemed sufficient to enable the latter Court to exercise in regard

to the matters directed by the order, such jurisdiction as either of such Courts could exercise in regard to similar matters within their respective jurisdictions

This is section 50 of the Act of 1907 and corresponds to section 122 of the Eng Bankruptcy Act 1924. Its object is to give power to all Courts having insolvency jurisdiction under the Act to enforce the orders of other Courts having like jurisdiction (see Statement of Objects and Reasons to the Act of 1907.) All Courts exercising insolvency jurisdiction are to be auxiliary to and act in aid of each other in all matters of insolvency. *In re Naoropi Sarabji* 33 Bom, 462. See also *Re Manchji*, 10 Bom L R 84. It seems that for the purpose of a concerted action within the meaning of this section a formal request from one Court to another is necessary, see *Re King & Co*, 38 Cal 542 12 I C 14. A request from the original Court is the foundation for the jurisdiction of the auxiliary Court so there can be no such jurisdiction in absence of a request. *Ibid*

This section ought to be read along with the provisions of sec 36. *I* vide the notes under that section, at p 237 *ante*

The Courts to act in concert with each other must have jurisdiction in insolvency otherwise this section will have no application. A Court having insolvency jurisdiction cannot act as auxiliary to a Court having no such jurisdiction. *Calendar Sykes and Co v Colonial Secretary of Lagos* (1891) A C 460 68 L T 297. So it has been held in a recent case that in order to make the provisions of this section applicable the Court in which the proceedings have been initiated as well as the Court which is invited to assist it must both have jurisdiction in insolvency matters. *Lalji Sahay v Abdul Gam* 12 C L J 452. *Callender Syke & Co v Colonial Secretary of Lagos* (1891) App Cas 460. *Vide* also under the heading "concurrent proceedings in and outside India" at p 239 *ante*. The section should not be so interpreted as to enable one Court to shirk its own work or to shift its duty on to another Court. *Ex parte Goldstein* (1917) 2 K B 729

All Courts Must necessarily mean the Provincial Courts of British India to which this Act applies. Cf *Lalji Sahay v Abdul Gam* *supra*. The jurisdictions conferred by this Act and by Act III of 1909 (Presidency towns Insolvency Act) are distinct. *Greenwasa Iyengar v Official Assignee* Mad 472 25 M L J 299 (1913) M W N 1004 14 M L T 184 21 I C 77 (*Vide* at p 5, *ante*) yet by virtue of s 18A of the Presidency Act the original side of High Court can exercise control over insolvency proceedings in subordinate Courts. Before the enactment of the

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77. [§ 50] All Courts having jurisdiction in insolvency and the officers of such Courts respectively shall severally act in aid of and be auxiliary to each other in all matters of insolvency and in order of a Court seeking aid with a request to another of the said Courts shall be deemed sufficient to enable the latter Court to exercise in regard

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tion 18A (in force from 20th March, 1930) it was held that the Commissioner in Insolvency exercising jurisdiction under sec 18 of the Presidency Towns Insolvency Act, 1909, had no power to interfere with insolvency proceedings pending in a provincial District Court, *Re Manekchand Virchand* 17 Bom, 275 1 Bom L R 872 A I R 1921 Bom 390 75 I C 61 But a different view seems to have been taken in *Re Jendras Jhi* 21 40 Cal 78, 18 I C 908 A District Court exercising insolvency jurisdiction is, no doubt a Court of concurrent jurisdiction with the High Court in its bankruptcy jurisdiction and the question is whether the latter has any power to order stay of the proceedings, before the District Court. Formerly it was held that neither sec 18 of the Presidency Act nor sec 107 of the Government of India Act would authorise an Insolvency Judge of the High Court to make an order of stay of proceedings in the District Court, see *Saroon & Sons v Gosto Behari* 31 C W N 847 A I R 1927 Cal 69 103 I C 754 this view was affirmed by the I B in *Sarat Ch v Barlow & Co* 56 Cal 712 33 C W N 15 113 I C 860 (I B) approving *Re Virginit*, 19 Bom 788 But as said above the aforesaid sec 18A has effected a change in the law and superseded the above I B case and the other cases taking the same view. Even if there were no statutory obligations to act in concert still all British Courts of Insolvency ought to act as auxiliary to, and in aid of, one another *Cf Re Issie Shrigen* of a firm took had been adju Court made an aid of and is auxiliary to the proceedings in England See also *Re Mickadven & Co* 77 L J K B 319 Where concurrent proceedings are taken in different Courts no such order should be made as would lead to friction or conflict of jurisdiction. vide notes at p 237 ante (The insolvency Court in Bombay has however no jurisdiction to restrain a decree holder from filing a suit against an insolvent who has obtained his discharge in the Insolvency Court in a foreign State, within whose jurisdiction the insolvent has his property, for recovering a debt in respect of which discharge has been obtained) *Lakshmi Ram v Punimchand* 22 Bom, I R 1173 59 I C 111

The word "shall" indicates the absolute obligation of all the insolvency Courts to render mutual assistance to each other. When such assistance is sought of a Court then the request for assistance is sufficient to give jurisdiction to such Court to deal with matters in respect of which assistance is sought. The assistance contemplated in this section should be sought whenever a matter for consideration can be more effectively and conveniently dealt with by the auxiliary Court than the principal

pal one. For instance when a debtor is adjudged an insolvent by the Dacca Court and a petition is made under sec 53 for annulment of a transfer by the insolvent in respect of a property situated at Monghyr where the witnesses to the transfer reside the Dacca Court ought to call in the aid of the Monghyr Court for a determination of the question raised between the parties *Lalji Sahai v Abdul Piri* 15 C W N 253 12 C L J 452 - 1 C 76. Cf *Abdul Ra'ak v Basiruddin*, 15 C L J 457 1 C W N 405. The aid may be of any shape. It may be for a mere enquiry as in 15 C W N 253 or may be for a mere transfer of the sale proceeds held by the auxiliary Court, *Re Jcandas Jhauar* 40 Cal 75 18 I C 908. An appeal from an order of the auxiliary Court will lie to its own normal appellate Court and the question will not be influenced by any reference to the requesting Court see *Ex parte Fletcher*, (1877) 6 Ch D 350.

78 [New] (1) The provisions of sections 5 and 12 of the Indian Limitation Act, 1908 shall apply to appeals and applications under this Act, and for the purpose of the said section 12, a decision under section 4 shall be deemed to be a decree.

Limitation

(2) Where an order of adjudication has been annulled under this Act in computing the period of limitation prescribed for any suit or application for the execution of a decree [other than a suit or application in respect of which the leave of the Court was obtained under sub section (2) of section 28] which might have been brought or made but for the making of an order of adjudication under this Act the period from the date of the order of adjudication to the date of the order of annulment shall be excluded.

Provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act.

The Section This section is new and has been considered necessary in view of the various decisions expressing a doubt as to whether secs 5 and 12 of the Limitation Act could be called in aid in the matter of computing periods of limitations for insolvency appeals and applications, see *Sivaramiah v Bhujanga*, 39 Mad, 596, *Kaparthi v Aratchi*, 41 Mad, 169, F B 44 I C 853 33 M L J 566, *Chavara*

Ramaswami v Venkataswara, 42 Mad, 13, *Rampal Singh v Nandalal*, 16 C W N 346—following *Maniram v Rupchand* 33 Cal, 1047 10 C W N 874, *Dropadi v Hirralal*, 34 All. 496, F B—overruling *Jugal Kishore v Gur Narain*, 33 All. 798 8 A L J 833, *Thakur Prosad v Purno Lal*, 35 All., 410 11 A L J 603 20 I C 673, *Waryam v Madhava*, 6 I C 588 8 P W R 1918, *Ram Kissen v Umrao Bibi*, 80 P W R 1916 33 I C 730* and also see the cases under the heading "Limitation" under sec 75 at p 475. The present section settles the conflict of opinion in the above cases by enacting that sections 5 and 12 of the Limitation Act will apply to insolvency appeals and applications. *Vide* the *Select Committee Report* published on 24th Sep 1919. It should be noticed that in no other section of the Limitation Act has been mentioned "So" it has been held that sec 14 of the said Act will not apply to insolvency proceedings, *Duraisami v Meenalshi*, 25 I C 610 16 M L T 246 (1914) M W N 131. But notice the effect of the amended section 29 of the Ind Limitation Act, and also read the notes at pp 475 76, *ante*, *Trasideva v Parameshwaraya* 39 Mad, 74. As the Act has no retrospective operation, the provisions of this section do not extend to cases started under the Act of 1907.

Extending limitation for sufficient cause—old Act and new Act

Pulpati v Ravuri, 41 M L J 126 (1921) M W N 381 64 I C 270 O. In other words, the section has not the effect of empowering the Court to extend the period of limitation in respect of a petition under the Act of 1907. So, where a petition was presented under the old Act more than three months after the act of insolvency on which it was grounded the Court could not excuse the delay by applying this section. *Aiyapuraju v Venkata*, 44 M L J 303 (1923) M W N 195 18 L W 38 A I R 1923 Mad 462 72 I C 488. See also *Shenai v Alkhai v Ramlal Marwari*, *infra*. When the proceeding is under the Act of 1907, sec 5 of the Limitation Act will not apply, *Nur Mahammad v Lalchand*, 7 Lah L J 201. This section empowers the Court to excuse delay in all applications under the Act. The High Court can excuse the delay in asking for leave and grant the leave at the time of hearing of the appeal itself. See the decision of Spence and Devadoss JJ. dated the 30th August 1923 (in C M A No of 1922 Mad H C 45 M L J 8 (notes), see *Karuthan Chethiar v Raman Chetty* A I R 1924 Mad 400 45 M L J 844 (1923) M W N 746 18 L W 808 80 I C 376. Cf *Horomohun v Mohan Das* 39 C L J 432 A I R 1924 Cal 849 83 I C 360. The Court can excuse also the delay in presenting an appeal or an applica-

* We do not deal with these cases *in extenso* as they now stand abrogated by this new section.

tion, *Anantanarayana v Rama Subba Iyiar*, 47 Mad 671 18, L W 557 A I R 1924 Mad 345 79 I C 395 But in a Sind case this section has been held not to apply to petition for adjudication and therefore the time for presentation of an insolvency petition cannot be extended under s 5 of the Limitation Act, and the reason given for this view is that petitions are not "applications" within the meaning of the section, *Bulomal v Soomar Khan*, A I R 1928 Sind 177 112 I C 646 The effect of this section is that there can be no extension of the period of limitation for a creditor's petition, *vide ibid* It has been pointed out in *Hazara Singh v Ditta Ram*, A I R 1930 Lah 417, that the question whether the term "application" here includes a petition for insolvency is not free from difficulty, there being opposite views on the point Cf A I R 1925 Lah 436

N B This section really enacts a further exception to sec 9 of the Limitation Act, *Rama Pillai v Kasamuthu Nadar*, (1929) M W N 369 A I R 1929 Mad 715 30 L W 327 121 I C 485

Decree. For the purposes of sec 12 of the Limitation Act, a decision under sec 4 of this Act will be looked upon as a decree *Vide* notes under the heading "Court fees" at p 472, *ante*

Sub-section (2) This sub-section makes provision for excluding the period between an adjudication order and an order of annulment thereof during which a suit or an application for execution remained suspended We have the following note in the Select Committee Report dated the 24th September 1919 "We have adopted the suggestion that where a creditor's right to sue is barred by the provisions of the Act the period between the making of an order of adjudication and the annulment of such an order shall be excluded from the period of limitation applicable to the suit These provisions however will not apply to suits in respect of debts which are provable but not proved under the Act" An order of adjudication is a pre requisite for the applicability of this sub section A person is not entitled to claim hereunder exclusion of the period spent by him in an Insolvency Court, unless there is a legal order of adjudication passed in the insolvency proceedings *Bakram v Supadasa* 121 I C 55 (Nag) It should be noticed that this sub section embodies the equitable principle that a lapse of time beyond the control of a man should not be reckoned against him So, it has been maintained that a debt does not become barred by lapse of time if it was not so barred at the commencement of bankruptcy, *Baranashi v Bhabadev* 34 C L J 167 66 I C 758, *Siva Subramania v Teethappa* 45 M L J 166 (1923) M W N 895 75 I C 572 *Re Bower* (1914) 2 Ch D 68

Re Westley, 10 Ch D 776, and the other cases under the heading "Barred debts" at pp 222 and 226, *ante*. But the above rule will not apply unless the debt is proved *under the Act*, *Sheik Akaj v Ramlal Marican*, *infra*. The express on "under the Act" is not a meaningless superfluity and its significance should not be lost sight of as was done in the case of *Krishna Chandra v Jotindranath*, 48 CLJ 574 AIR 199 Cal 159 114 IC 415. In this case the insolvent entered in the schedule of his bankruptcy petition the name of the decree-holder as his only creditor. This creditor did not tender any proof of his claim in the manner indicated in sec 49, nor was any schedule prepared under sec 33 of the Act, and when upon annulment of adjudication in consequence of failure to apply for discharge under sec 43, the decree holder creditor sought to execute his decree more than three years after the date of the decree, the Court mistakenly held that the time wasted in the bankruptcy proceedings could be deducted under this section (notwithstanding the fact that the debt was not proved *under the Act*). Similarly, in a Madras case, in which a decree was obtained against an adjudicated insolvent together with the official Receiver, who was impleaded as a party to the suit the debt was considered to have been *proved* with the meaning of the proviso to this section, although the formal method of proving the debt as provided by the Act was not adopted, *Ramalinga Ayyar v Rayalu*, 53 Mad 243 58 MLJ 170 (1930) MWN 408. Again the benefit of this section can be invoked only by the party whose hands were stayed during the bankruptcy proceedings. Therefore a person who brings a suit against the insolvent during the pendency of the insolvency proceeding is not entitled to the benefit hereof. *Machanjeeri Ahmed v Govind Prabhu*, 51 Mad 862 28 LW 352 55 MLJ 661 (1928) MWN 536 AIR 1928 Mad 977 114 IC 227. Or, to put the matter in another form the benefit of the section can be invoked after annulment of adjudication and not during the pendency of insolvency proceedings. *Ibid*. A person who wants to sue in the ordinary Courts for relief against an insolvent cannot claim the benefit hereof. *In re Benson Borer v Chetwynd* (1914) 2 Ch 68 83 LJ Ch 658. The wording of the section makes it clear that it applies only to cases where the creditors of an insolvent propose to institute suits or file application for the execution of decree against the insolvent, *Rama Pillai v Kasamuthu Nadar* (1929 MWN 369 AIR 1929 Mad 715 121 IC 485). The section cannot be applied to enlarge the period of limitation in favour of insolvents and in respect decrees or debts enforceable by such insolvents against their debtors. *Ibid*. Where pending a suit by a creditor, a debtor is adjudicated an insolvent and a decree is passed against the debtor and his official

assignee but the adjudication is annulled an execution application filed more than 3 years after the date of the decree will not necessarily be time-barred, 57 M L J 51(n)

The equitable principle of this section cannot however apply in the two following cases—

(a) When leave was previously obtained for the suit or the application under sec 28 (2)

(b) When the suit or the application is in respect of a debt which is proveable but has not been proved *under this Act*

With reference to Cl (a) it should be noticed that where the permission to sue and to execute the decree under sec 28 (2) is subject to conditions which make it impossible for the creditor to execute the decree obtained by him the permission is ineffectual to exclude the unfettered operation of this section and the creditor will be entitled hereunder to deduct from the period of limitation for execution the period between the adjudication and the annulment, *Mulchand v Rajdhar*, 23 A L J 975 A I R 1925 All 73, 88 I C 544 The underlying principle is that deduction of time is allowed because of the suspension of the right of suit during bankruptcy so where there is no suspension there is no deduction comp *Sidhray Bhojara v Allu Haji*, 47 Bom 244 A I R 1923 Bom 33 (a case under the Presidency Act)

Proviso The proviso to sub sec (2) is very important. In order to be entitled to the benefit of sub sec (2), the debt must be proved *under this Act*. As there was no similar provision in the Act of 1907, a debt proved under that Act will not enjoy the protection that this subsection confers, *Sheikh Akhaj v Ramlal Marwari* (1923) Pat 271 A I R 1924 Pat 40 In this case, a person was adjudged an insolvent on 1st November, 1917, on his own petition dated the 1st August, 1917. A creditor of the insolvent, who obtained a decree for money against him on 3rd August 1917, applied on the 14th May, 1921 to the Insolvency Court to be entered in the schedule of creditors but the said application was rejected on the 11th Feb 1922. Then, on the annulment of the adjudication order on the 27th October, 1922, the decree holder creditor applied for execution of his decree. Held the application for execution was barred by limitation. *Ibid*

Onus of proving right to enlarged period The onus is on the person who claims to take advantage of an exception to the general law of limitation to prove that he comes within such exception, *Rama Pillai v Kasamuthu supra*

Saving of limitation by acknowledgment in Schedule : The mention of a debt in the schedule of a bankruptcy petition may operate to save limitation provided the requirements of sec 19 of the Limitation Act as to signature etc are com-

plied with, see *Ram Pal v. Nanda Lal*, cited at p. 103, also *Srigopal v. Dhonalal*, 35 Bom 383, *A. K. R. M. M. C. T. Chettjar Firm v. S. E. Munnee*, 6 Rang 533 AIR 1928 Rang. 326.

79. [§51] (1) The High Court may, with the

Power to make rules

previous sanction, in the case of the High Court of Judicature at Fort William in Bengal, of the Governor General in Council, and, in the case of any other High Court, of the Local Government, make rules for carrying into effect the provisions of this Act

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide—

(a) for the appointment and remuneration of receivers (other than Official Receivers), the audit of the accounts of all receivers and the costs of such audit,

(b) for meetings of creditors.

(c) for the procedure to be followed *where the debtor is a firm*,

(d) *for the procedure to be followed* in the case of estates to be administered in a summary manner, and

(e) *for any matter which is to be or may be prescribed**

(3) All rules made under this section shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall, on such publication, have effect as if enacted in this Act

This is section 51 of the Act of 1907. Under this section the different High Courts have been invested with powers to make rules for carrying into effect the provisions of this Act. Therefore, the High Court will have no power to make rules inconsistent with the Act or for a purpose which will not

* Clause (e) has been added by the Provincial Insolvency (Amendment) Act, (XXXIX of 1926), which received the assent of the Governor General on 9th September, 1926

further the object of the Act, Cf *Re Houc*, (1887) 18 Q B D. 573 (575) also (1898) A C 720 (729). Under sub-sec (2) such rules may provide (i) for the appointment, remuneration and the control of the receiver, (ii) for meetings of creditors Cf notes at p 420, *ante*, (iii and iv) for the procedure in cases of insolvent firms, and in summary cases, and (v) for any matter for which the Act authorises the making of rules. See secs 19 (2), 30, 37, 57, 59A, 64, 67A, 74 (2), 76, 80. These powers are similar to those vested in the High Courts by the Charter, the Letters Patent and the Civil Procedure Code, 1908, and are subject to like sanction. In the case of the Calcutta High Court which has Imperial connection, sanction from the India Government is necessary, and in the case of the other High Courts sanction from the local Governments will do.

Under sec 24 of the General Clauses Act, 1897, the rules made under a repealed Act continue in force till superseded by new rules made under a new Act, also see *Darrah v Fazal Ahmad*, cited at p 8, *ante*.

Adjudication of Firm For the amendment in cl (c) of sub sec (2), see the Select Committee Report, dated the 24th September, 1919. Under the repealed Act there was some doubt as to the possibility of partners being adjudicated in the name of the firm, see pp 71-72, *ante*. But this doubt has now been removed by the amendment in this clause cl (c). "Firm" is the collective name of persons entering into partnership with one another, sec 239 of the Indian Contract Act. It is not a legal entity, nor is it a person, *Seodajal Khemka v. Joharmull Manmull*, 50 Cal 549 (558) A I R 1924 Cal. 74 75 I C 81. It is merely a collective name for the individuals making up the partnership, *Ibid*, a firm name is merely a short-hand form for collectively designating all the partners in the firm, *Honda Ram v Chhman Lal*, 100 I C 112 (Lah). So it has been said that "a firm is not in law a distinct and separate person from the partners composing it. The firm name is merely recognised for collectively designating all the partners. Adjudication of a firm has the effect of adjudicating every individual partner." *Official Receiver v Naranda Lotaram*, A I R 1926 Sind, 31 89 I C 493, *Mahomed Umar v Official receiver*, A I R 1929 Lah 447 119 I C 735, *Re Firm of Utma Malik*, A I R 1928 Sind, 114 107 I C 442. Sec 61 (4) also points to the conclusion that where a partnership firm is adjudicated, each individual partner becomes an insolvent, see *Honda Ram v Chhmanlal*, *supra*. Where the debtor is a firm the application for insolvency must be in the name of the firm, and must be signed in the manner laid down in rules 19, 22, 24 framed by the High Court (Calcutta) under this section, *Satish Chandra*

Adda v Firm Raj Narain Pakhira 72 I C 60 (Cal) At the time of making an adjudication order against the partners of a firm the Court need not order as to the course of administration in insolvency with reference to the joint estate of the firm and the separate estate of the partners That is a matter that must be considered and determined during the subsequent proceedings consequent upon adjudication, *Debendra v Puru satham* 55 I C 186 Cf sec 61 (4), ante The term 'firm' in so far as it implies a partnership by contract, cannot include a minor, see *Sannyasi Charan's* case cited at p 73 Family concerns may loosely be termed as firms and minors may be admitted to the benefits thereof, vide notes and cases at p 14 ante Cf *Solkhanadha v Solkhanadha*, 28 Mad 344 (1915) A debt owing by one partner only will not support a joint adjudication against him and his co partners *Ex parte Clarke* 1 Dea & Co 544 But a debt owing by all the partners of a firm is sufficient to support an application, *Ex parte Batta* 15 (1900) 2 Q B 698

Sub-sec. (3.) The rules framed under the section shall be published in the Gazette of India or in the local Official Gazette, as the case may be and will have the force of law from the moment of their publication

80. [§ 52] (1) The High Court, with the like sanction, may from time to time direct that, in any matters in respect of which jurisdiction

Delegation of powers
to Official Receivers

is given to the Court by this Act, the Official Receiver shall, subject to the directions of the Court have all or any of the following powers, namely —

(a) * * * *

(b) to frame schedules and to admit or reject proofs of creditors,

(c) * * * *

(d) * * * *

* Clauses (a) (c) and (d) have been omitted by the Provincial Insolvency (Amendment) Act (XXIX of 196) which received the assent of the Governor-General on 9th September 196 They were as follows—

(a) to hear insolvency petitions to examine the debtor and to make orders of adjudication

(c) to grant orders of discharge

(d) to approve compositions or schemes of arrangement

Notes on the repealed clauses

Cf (a) Cf sections 24 and 27 When an adjudication order is made by the Official Receiver under this sub-clause the insolvent's estate does not vest in him under sec 56 or any provision and with

- (e) to make *interim* orders in any case of urgency, and
- (f) to hear and determine any unopposed or *ex-parte* application

(2) Subject to the appeal to the Court provided for by section 68, any order made or act done by the Official Receiver in the exercise of the said powers shall be deemed the order or act of the Court

This is section 52 of the Act of 1907 and corresponds to sec 99 of the Bankruptcy Act, 1883 (now re-enacted in sec 102 of the Bankruptcy Act, 1914). Clauses (a), (c) and (d) of the section have been omitted by sec 7 of the amending Act XXXIX of 1926 (vide footnotes) on the recommendation of the Civil Justice Committee to restrict the power of the Official Receiver "to hear insolvency petitions, to examine the debtor, to make orders of adjudication to grant orders of discharge and to approve compositions or schemes of arrangement", see Statement of Objects and Reasons for Bill No 41 of 1926, published in the Gazette of India, dated the 21st August, 1926, Part V, at p 137. See also the Civil Justice Committee Report, p 238. By sec 2 of Act XII of 1927 the above section 7 of Act XXXIX of 1926 was repealed as being spent. Act XII, being spent out, has in its turn been repealed by sec 3 of Act XVIII of 1928. The effect of wiping out the spent out statutes, is not to touch the amendment made in 1926.

Under this section the High Court can, subject to sanction of the Indian Government or the local governments in the manner referred to in the previous section, delegate certain powers to the Official Receiver. These powers have been enumerated in the clauses attached to sub sec (1). Under this section no power has been delegated to an Official Receiver to make an order on a claim petition. *Vellayappa Chettiar*

not do so unless an order vesting it in him is passed by the Court. *Official Receiver Trichinopoly v Somasundaram* 30 M L J 415. *Muthusami v Somoo* 39 M L J 438. *Sankara Rao v Rama Krishnayya* 19 L W 450 (1924) M W N 198. 46 M L J 184. 1924 Mad 461. 28 I C 294. See also at pp 369 70 and 379 80.

Cl (c). Cf secs 41 and 42. The Official Receiver who can make an order of adjudication can also fix the period within which the debtor is to apply for discharge. *Arunagiri Mudaliar v Kandasami* 19 L W 418 (1924) M W N 331. A I R 1924 Mad 635.

Cl (d). Cf Secs 20, 21, 23, 28 etc.

v Ramanathan, 47 Mad 312 46 M L J 80 (1924) M W N 163 19 L W 251 A I R 1924 Mad 448 78 I C 1017

Cl (b) Frame Schedule Cf sec 33 In framing a schedule under this clause the Official Receiver does not decide judicially or finally upon contested claims, *Khadrishaw v Official Receiver Tinnevely*, 41 Mad 30 So where the Official Receiver once enters the name of a creditor in the Schedule he may afterwards, for good cause, ask the Court to expunge such creditor's name under sec 50, or to take action against him under sec 53 (*Ibid*) As to whether an Official Receiver's power of rejecting proof extends to the case of a secured creditor, see *Muthuswami Chettiar v Official Receiver, North Arcot*, 51 M L J 287 (1926) M W N 935 A I R 19 6 Mad 1019 97 I C 407

Cl (e) Under this clause the Official Receiver can hear and determine an *unopposed* or *ex parte* application When the Official Receiver is given a power under this clause, his jurisdiction is ousted as soon as there is contest or opposition

Though the Official Receiver has been invested with certain *quasi* judicial functions under this section still he is not a Court So when the insolvent uses forged documents before the Official Assignee, it is the Court and not the Official Assignee that should make complaints under sec 195 of the C P Code, *Beerdsell & Co v Abdul Ganni*, 37 Mad 10 or under sec 70, *supra* He is not a Court subordinate to the District Court within the meaning of sec 75 of this Act and therefore an order of the District Court confirming that of the Official Receiver is not final and is therefore open to an appeal, *Alla Pichai v Kuppai Pichai*, 40 Mad 752, 32 M L J 449, 39 I C 429 *Chidambaram v Nagappa*, 38 Mad 15 24 M L J 73 16 I C 820

Difference between a Receiver and an Official Receiver

An Official Receiver appointed under sec 57 exercises such judicial or *quasi* judicial powers as are conferred on him by Rules framed under sec 80 But the powers of an ordinary Receiver under sec 50 are purely executive or administrative in character and not judicial *Nilmom Choudhury v Durga charan* 22 C W N 704 46 I C 377

Sub-sec. (2) : Appeals • An appeal against an order of the Official Receiver lies to the Court under sec 68 and not to the High Court under sec 75 (2) *Chidambaram v Nagappa Chetty* 38 Mad 15 24 M L J 73 16 I C 820 Cf *Allapichai v Kuppai Pichai* 40 Mad 752 32 M L J 449 39 I C 429 Such rights of appeal is not confined to any particular kind of orders but extends to all (*Ibid*)

81. [§ 54] Any Local Government, * * *
 Power of Local Government to bar applica-
 tion of certain provisions to certain Courts may, by notification in the local
 official Gazette, declare that *any*
of the provisions of this Act
specified in Schedule II shall not apply to insol-
 vency proceedings in any Court or Courts having
 jurisdiction under this Act in any part of the terri-
 tories administered by such Local Government.

This is section 54 of Act III of 1907. The Principle on which this section is based is that as all the different parts of the country are not equally advanced and as different parts have different requirements, the same law cannot equally apply to all of them. "A law adopted for the towns is too complicated for the country districts and a law suited for the country districts is altogether insufficient for the great centres of trade"—see the Council minutes relating to Act III of 1907. It is with this view that provisions are herein made to exempt particular territories from particular provisions not suited to them.

Change of Law. Under the Act of 1907, the power of the local Government to bar applications of the provisions of this Act was limited to the particular sections mentioned in sec 54, now sec 81, but under this Act those sections have been enumerated in Schedule II.

Notification. For such a notification see *Burma Gazette*, 1908, Pt I, p 300. In order to bar application of certain provisions of this Act there must be a *notification* for the purpose in the local official Gazette. Formerly, a previous sanction of the Governor-General in Council was necessary to empower a Local Government to take action under this section, but now the law in that behalf has been altered by the Devolution Act, 1920, *vide the Footnote*.

82. [§ 55] Nothing in this Act shall—

(a) affect the *Presidency towns Insolvency Act, 1909*,¹ or

(b) apply to cases to which Chapter IV of
 the *Dekkhan Agriculturists' Relief*
 Act, 1879, is applicable

Savings

¹ Here the words "with the previous sanction of the Governor-General in Council" have been omitted by the Devolution Act 1920.

² The words "or section 8 of the Lower Burma Courts Act 1900" have been omitted by Act viii of 1930. This repeal is consequential on the repeal of Act vi of 1900 by Act XI of 1923.

SCHEDULE II

[See section 81]

*Provisions of the Act application of which may be barred by
Local Governments*

<i>Provisions of the Act</i>	<i>Subject</i>
<i>Section</i>	
26	<i>Award of compensation</i>
28, sub-section (3).	<i>Reputed property of an insolvent</i>
34	<i>Debts provable under the Act</i>
38	<i>Compositions and schemes of arrangement</i>
39	
40	
42, sub-sections (1) and (2)	<i>Obligation to refuse absolute discharge</i>
45	<i>Method of proof of debts</i>
46	
47	
48	
49	
50	<i>Effect of insolvency on antecedent transactions</i>
51	
52	
53	
54	
55	

SCHEDULE II—*contd*

[See section 81]

*Provisions of the Act application of which may be barred by
Local Governments*

<i>Provisions of the Act</i>	<i>Subject</i>
Section— <i>concl'd</i>	
61, [except clause (a) of sub section (1) and sub section (4)]	Priority of debts
62	Dividends
63	
64	
65	
66	Management by and allowance to insolvent
72	Penalty for obtaining of credit by undischarged in solvent

SCHEDULE III

ENACTMENTS REPEALED

[See section 83]

<i>Year</i>	<i>No</i>	<i>Short title</i>	<i>Extent of repeal</i>
1907	III	The Provincial Insol vency Act 1907	So much as has not been <i>repealed</i>
1914	IV	The Decent alization Act 1914	In Schedule I Part I the entry relating to Act III of 1907
1914	X	The Repealing and Amending Act 1914	In Schedule I the entries relating to Act III of 1907

NB—This schedule has been omitted by the Repealing Act XII
of 1927

APPENDIX A.

CALCUTTA HIGH COURT RULES

(Act V of 1920)

Published in the Calcutta Gazette, dated the 8th June, 1921

No 3022G —The following rules having been framed by the High Court of Judicature at Fort William in Bengal in the exercise of the powers vested in it by section 79 of the Provincial Insolvency Act, 1920 (V of 1920), with the sanction of the Governor-General in Council is published for general information —

The Provincial Insolvency Act, 1920 (V of 1920)

(1) The following rules may be cited as "The Provincial Insolvency Rules" The forms prescribed by these rules Framed under section 79, Act V of 1920 with such variations as circumstances may require, shall be used for the matters to which they severally relate

(The forms are reproduced as Civil Process Forms Nos 137 to 150 in Volume II)

(2) Every insolvency petition shall be entered in the Register of Insolvency Petitions to be maintained in all Courts exercising Insolvency Jurisdiction and shall be given a serial number in that Register, and all subsequent proceedings in the same matter shall bear the same number

(3) All insolvency proceedings may be inspected at such times and subject to such restrictions as the District Judge may prescribe, by the Receiver the debtor, and any creditor who has proved or any legal representative on their behalf

Notices

(4) Whenever publication of any notice or other matter is required by the Act or by these Rules to be made in an official Gazette, a memorandum referring to and giving the date on which such advertisement appeared shall be filed with the record and noted in the order sheet

(5) Notice of an order fixing the date of the hearing of a petition under Section 19 (2) shall be published in the local official Gazette and advertised in such newspapers as the Court may direct A copy of the notice shall also be forwarded by registered letter to each creditor to the address given in the petition The same procedure shall be

followed in respect of notices of the date for the consideration of a proposal for composition or scheme of arrangement under section 38 (1)

(6) Notice of an order of adjudication under section 30 may, in addition to the publication in the local official Gazette required by the Act, be published in such newspapers as the Court may direct. When the debtor is a Government servant, a copy of the order shall be sent to the head of the office in which he is employed. The same procedure shall be followed in regard to notices of orders annulling an adjudication under section 37 (2)

(7) The notice to be given by the Court under section 50 shall be served on the creditor or his pleader, or shall be sent through the post by registered letter

(8) The notice to be issued by the Receiver under section 64 before the declaration of a final dividend to the persons whose claims to be creditors have been notified, but not proved, shall be sent through the post by registered letter

(9) Notices of the date of hearing of applications for discharge under section 41 (1) shall be published in the local official Gazette and in such newspapers as the Judge may direct, and copies shall be sent by registered post to all creditors whether they have proved or not

(10) A certificate of an officer of the Court or of the Official Receiver, or an affidavit by a Receiver that any of the notices referred to in the preceding rules has been duly posted accompanied by the Post Office receipt shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed

(11) In addition to the prescribed methods of publication, any notice may be published otherwise in such manner as the Court may direct, for instance, by affixing copies in the Court house or by beat of drum in the village in which the insolvent resides

Receivers

(12) Every appointment of a Receiver shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the Court should be served on the debtor, and forwarded to the person appointed

(13) (1) A Court when fixing the remuneration of a Receiver should, as a rule, direct it to be in the nature of a commission or percentage, of which one part should be payable on the amount realised, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividends

(2) When a Receiver realizes the security of a secured creditor, the Court may direct additional remuneration to be paid to him with reference to the amount of work which he has done and the benefit resulting to the creditors

(14) The Receiver shall keep a cash-book and such books and other papers as to give a correct view of his administration of the estate

and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court, and shall be paid out of the estate.

(15) Any creditor who has proved his debt may apply to the Court for a copy of the Receiver's accounts (or any part thereof) relating to the estate, as shown by the cash book up to date, and shall be entitled to such copy on payment of the charges laid down in the rules of this Court regarding the grant of copies.

(16) In any case in which a meeting of creditors is necessary and in any case in which the debtor proposes a composition or scheme under section 38, the Receiver shall give seven days' notice to the debtor and to every creditor of the time and place appointed for such meeting. Such notices shall be served by registered post.

Proof of Debts

(17) A creditor's proof should be in Civil Process Form No 145 in Volume II, with such variations, as circumstances may require.

(18) In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor or by some other persons on behalf of all such creditors. Such proof shall be in Civil Process Form No 147 in Volume II.

Procedure where the Debtor is a Firm

(19) Where any notice, declaration, petition, or other document requiring attestation is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall also add his own signature, *e.g.* "Brown & Co by James Green, a partner in the said firm."

(20) Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court on any one of the partners or upon any person having at the time of service the control or management of the partnership business there.

(21) The provision of the last preceding rule shall so far as the nature of the case will admit, apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own.

(22) Where a firm of debtors file an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same.

(23) An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm

(24) In cases of partnership the debtors shall submit a schedule of their partnership affairs, and each debtor shall submit a schedule of his separate affairs

(25) The joint creditors, and each set of separate creditors, may severally accept compositions or schemes of arrangement. So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner, notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted

(26) Where proposals for compositions or schemes are made by a firm, and by the partners therein individually, the proposals made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors, and the proposal made to each separate set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposals may vary in character and amount. Where a composition or scheme is approved, the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme

(27) If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And when any surplus shall arise upon the administration of the assets of such separate or independent firm the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein

Sale of Immoveable Property of Insolvent

(28) If no Receiver is appointed and the Court, in exercise of its powers under section 58 of the Act sells any immovable property of the insolvent, the deed of sale of the said property shall be prepared by the purchaser at his own cost, and shall be signed by the Presiding Officer of the Court. The cost of registration (if any) will also be borne by the purchaser

Dividends

(29) The amount of the dividend may, at the request and risk of a creditor, be transmitted to him by post

Summary Administration

(30) When an estate is ordered to be administered in a summary manner under section 74 of the Act, the provisions of the Act and Rules

shall, subject to any special direction of the Court, be modified as follows, namely —

- (i) There shall be no advertisement of any proceedings in the Local Official Gazette or in any newspaper
- (ii) The petition and all subsequent proceedings shall be endorsed "Summary Case"
- (iii) The notice of the hearing of the petition to the creditors shall be in Civil Process Form No 150 in Volume II
- (iv) The Court shall examine the debtor as to his affairs, but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross examine the debtor
- (v) The appointment of a Receiver will often not be necessary and the Court may act under section 58 of the Act in order to reduce the cost of the proceedings

Costs

(31) All proceedings under this Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting the same, but when an order of adjudication has been made the reasonable costs of the petitioning creditor shall be payable out of the estate

(32) No costs incurred by a debtor of, or incidental to, an application to approve of a composition or scheme, shall be allowed out of the estate if the Court refuses to approve the composition or scheme

II—*Cancel Civil Process Forms Nos 137-150 at pages 417 to 426 Volume II, of the Court's General Rules and Circular Orders, Civil, and substitute therefor the following —*

CIVIL PROCESS NO 137

DEBTOR'S PETITION

[Section 13 of the Provincial Insolvency Act V of 1920]

District

In the Court of the District Judge at

Petitioner

I (a)

(a) Insert name and address and description of debtor

(b) State name of Court and particulars of decree in respect of which the order of detention has been made or by which an order of attachment has been made against debtor's property

ordinarily residing at (or "carrying on business at," "or personally working for gain at," or "in custody at")
in consequence of the order of (b)

being unable to pay my debts, hereby petition that I may be adjudged an insolvent. The total amount of all pecuniary claims against me is Rs (c) as set out in detail in Schedule A annexed here unto, which contains the names and residences of all my creditors so far as they are known to, or can be ascertained by, me. The

(c) State whether amount and particulars of all my property are how, any of the debts set out in Schedule B annexed hereunto are secured together with a specification of all my property, not consisting of money, and the place or places at which such property is to be found and I hereby declare that I am willing to place all such property at the disposal of the Court save in so far as it includes such particulars (not being my books of account) as are exempted by law from attachment and sale in execution of a decree

I have not on any previous occasion filed a petition to be adjudged an insolvent, or, I set out in Schedule C particulars (d) relating to my previous

(d) The particulars required are Petition to be adjudged an insolvent
petitions

(i) Where a petition has been dismissed reasons for such dismissal

(ii) Where the debtor has previously been adjudged an insolvent concise particulars of the insolvency including a statement whether any previous adjudication has been annulled and if so the grounds therefor

Verification clause as in plaints

Signature

CIVIL PROCESS No 138

NOTICE TO CREDITORS OF THE DATE OF HEARING OF AN INSOLVENCY PETITION

[Section 19 of the Provincial Insolvency Act, V of 1920]

In the Court of the District Judge at

Insolvency Application No

of 19

Whereas A B has applied to this Court by a petition, dated of 19 to be declared an insolvent under the Provincial Insolvency Act, V of 1920 and your name appears in the list of creditors filed by the aforesaid debtor, this is to give you notice that the Court has fixed the day of 19 for the hearing of the aforesaid petition and the examination of the debtor If you desire to be represented in the matter you should attend in person or by duly instructed pleader The particulars of the debt alleged in the petition to be due to you, are as follows

Judge

Form on the reverse as in C P Form No 1 ante

shall, subject to any special direction of the Court be modified as follows, namely -

- (i) There shall be no advertisement of any proceedings in the Local Official Gazette or in any newspaper
- (ii) The petition and all subsequent proceedings shall be endorsed "Summary Case"
- (iii) The notice of the hearing of the petition to the creditors shall be in Civil Process Form No 150 in Volume II
- (iv) The Court shall examine the debtor as to his affairs, but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross examine the debtor
- (v) The appointment of a Receiver will often not be necessary and the Court may act under section 58 of the Act in order to reduce the cost of the proceedings

Costs

(31) All proceedings under this Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting the same, but when an order of adjudication has been made the reasonable costs of the petitioning creditor shall be payable out of the estate

(32) No costs incurred by a debtor of, or incidental to, an application to approve of a composition or scheme, shall be allowed out of the estate if the Court refuses to approve the composition or scheme

II—*Cancel Civil Process Forms Nos 137-150 at pages 417 to 46 Volume II, of the Court's General Rules and Circular Orders, Civil, and substitute therefor the following —*

CIVIL PROCESS NO 137

DEBTOR'S PETITION

[Section 13 of the Provincial Insolvency Act V of 1920]

District

In the Court of the District Judge at

Petitioner

I (a)

(a) Insert name and address and description of debtor

(b) State name of Court and particulars of decree in respect of which the order of detention has been made or by which an order of attachment has been made against debtor's property

ordinarily residing at (or "carrying on business at," "or personally working for gain at," or "in custody at")
in consequence of the order of (b)

being unable to pay my debts, hereby petition that I may be adjudged an insolvent. The total amount of all pecuniary claims against me is Rs (c) as set out in detail in Schedule A annexed hereto, which contains the names and residences of all my creditors so far as they are known to, or can be ascertained by, me. The

(c) State whether amount and particulars of all my property are how, any of the debts set out in Schedule B annexed hereunto are secured together with a specification of all my property, not consisting of money, and the place or places at which such property is to be found and I hereby declare that I am willing to place all such property at the disposal of the Court save in so far as it includes such particulars (not being my books of account) as are exempted by law from attachment and sale in execution of a decree

I have not on any previous occasion filed a petition to be adjudged an insolvent, or I set out in Schedule C particulars (d) relating to my previous

(d) The particulars required are Petition to be adjudged an insolvent
Petitions

(i) Where a petition has been dismissed reasons for such dismissal

(ii) Where the debtor has previously been adjudged an insolvent concise particulars of the insolvency including a statement whether any previous adjudication has been annulled and if so the grounds therefor

Verification clause as in plaints

Signature

CIVIL PROCESS NO 138

NOTICE TO CREDITORS OF THE DATE OF HEARING OF AN INSOLVENCY PETITION

[Section 19 of the Provincial Insolvency Act V of 1920]

In the Court of the District Judge at

Insolvency Application No

of 19

Whereas A B has applied to this Court by a petition, dated of 19 to be declared an insolvent under the Provincial Insolvency Act, V of 1920 and your name appears in the list of creditors filed by the aforesaid debtor, this is to give you notice that the Court has fixed the day of 19 for the hearing of the aforesaid petition and the examination of the debtor If you desire to be represented in the matter you should attend in person or by duly instructed pleader The particulars of the debt alleged in the petition to be due to you, are as follows

Judge

Form on the reverse as in C P Form No 1 ante

CIVIL PROCESS NO. 139.

ORDER OF APPOINTMENT.

[Section 27 of the Provincial Insolvency Act, 1834.]

In the Court of the District Judge at
Insolvency Appointment No. of 13

Pursuant to a petition, filed against [here insert the
description and address of debtor] and on the application of [here insert
"the Official Receiver" or "the debtor himself" or "A. B. of
a creditor."] and on reading and being it is

ordered that the debtor be and said debtor is hereby adjudged insolvent.
It is further ordered that the debtor do appear for his last day
within from this date.

Dated this day of

1834

CIVIL PROCESS NO. 140.

NOTICE OF APPOINTMENT BY DISCHARGED CREDITOR.

[Section 23 (2) Act 1834.]

In the Court of the District Judge at
Insolvency Appointment No. of 13

In the number of in the Court

No. of 13

To

Whereas an appointment has been made to this Court by you and it

be a creditor of

whose appointment to be declared an insolvent was filed in this Court
on the day of

for permission to produce evidence of the amount and particulars of
his pecuniary claims against the insolvent, and for an order whereby
his name is to be entered in the schedule as a creditor for the day
when he may prove. This is to give you notice that the said ap-
pointment will be heard in this Court on the day of
when you should appear personally or by proxy, if you want to
object to it.

Given under my hand and the seal of the Court, this the
day of 13

District Judge

Form on the reverse is a C. P. Form No. 1, and

CIVIL PROCESS NO 141

ORDER ANNULLING ADJUDICATION

[Section 35 of the Provincial Insolvency Act V of 1920]

In the Court of the District Judge at
Insolvency Application No

of 19

Applicant

On the application of R S, of , and on reading
and hearing , it is ordered that the
order of adjudication, dated against A B, of
, be and the same is hereby annulled

Dated this day of 19

Judge

CIVIL PROCESS NO 142

NOTICE TO CREDITORS OF THE DATE OF CONSIDERATION OF A
COMPOSITION OR SCHEME OF ARRANGEMENT

[Section 38 (1) of the Provincial Insolvency Act V of 1920]

In the Court of the District Judge at
Insolvency Application No

of 19

Applicant

Take notice that the Court has fixed the day
of 19 , for the consideration of a composition
(or scheme of arrangement) submitted by A B the debtor in the
above insolvency petition No creditor who has not proved his debt
before the aforesaid date will be permitted to vote on the consideration
of the above matter If you desire to be represented at above mentioned
hearing you should be present in person or by duly instructed pleader
with your proofs

Judge

On the reverse of the form

Date of filing process	
Date of making over process to Nazir	
Date on which made over to the process-server	
Date of return by process server after service	
Date of return by Nazir to Court	

CIVIL PROCESS NO 143

LIST OF CREDITORS FOR USE AT MEETING HELD FOR CONSIDERATION
OF COMPOSITION OR SCHEME

[Section 38 (2) of the Provincial Insolvency Act V of 1920]

In the Court of the District Judge at

In the matter of Insolvency Application No

of 19

Applicant.

Meeting held at

this

day of

19

No	Name of all creditors whose proofs have been admitted	Here state as to each creditor whether he voted and, if so, whether personally or by pleader	Amount of assests	Amount of admitted proof
		Total		

Required number of Majority

Required value

Rs

CIVIL PROCESS NO 144

NOTICE TO CREDITORS OF APPLICATION FOR DISCHARGE

[Section 41 (1) of the Provincial Insolvency Act V of 1920]

In the Court of the District Judge at

Insolvency case No

of 19

Applicant

Take notice that the abovenamed insolvent has applied at the Court for his discharge, and that the Court has fixed the day of 19 at o'clock for hearing the application

Dated this

day of

19

Judge

Note—On the back of this notice the provisions of section 42 (1) Act V of 1920 should be printed

Form on the reverse as in C P Form No 1, ante

I That the said was
were, at the date of
the petition, viz, the day of 19
and still $\frac{s}{are}$ justly and truly indebted to me
in the sum of Rs a p for (c) as shows
(c) State consideration by the account endorsed hereon (or the follow
and specify the vouchers ing account), viz, for which sum or any part
(if any) in support of the thereof I say that I have not, nor hath or any
claim person by order to my
knowledge or belief for use had or received any
(d) Here details of manner of satisfaction or security whatsoever
securities bills or the save and except the following (d)
like
Admitted to vote for Rs } Sworn at {
Judge or Official Receiver } this day of { Deponent's
before me } signature
Commissioner

CIVIL PROCESS No 147

PROOF OF DEBT OF WORKMEN

[Section 49 of the Provincial Insolvency Act V of 1920]

In the Court of the District Judge at
Insolvency Application No or 19
Applicant

I (a) of (b) make oath and say —(or solemnly and sincerely affirm
and declare)

I That (c) was
were
(a) Fill in full name at the date of the adjudication viz the day
address and occupation of deponent of 19
(b) The abovenamed and still $\frac{am}{are}$ justly and truly indebted to the
debtor or the foreman of several persons whose names addresses and
the abovenamed debtor descriptions appear in the schedule endorsed
or on behalf of the work hereon in sums severally set against their
men and others employ names in the sixth column of such schedule
ed by the abovenamed for wages due to them respectively as work
debtor men or others in (d)
(c) I or the said respect of services rendered by them respec-
(d) My employ or tively to (e)
the employ of the during such periods before the
abovenamed debtor date of the receiving order as are set out against their respective names
(e) Me or the in the fifth column of such schedule, for which said sums or any

part thereof, I say that they have not, nor hath any of them had or received any manner of satisfaction or security whatsoever

Admitted to vote for Rs	} this	Sworn at	} Deponent's signature
Judge or Official Receiver		day of	
		before me	

Commissioner

CIVIL PROCESS No 148

ORDER APPOINTING A RECEIVER

[Section 56 of the Provincial Insolvency Act V of 1920]

In the Court of the District Judge at
 In the matter of _____ an Insolvent
 No _____ of _____ 19
 Whereas A B, _____ was adjudicated an
 insolvent by order of this Court, dated _____
 and it appears to the Court that the appointment of a Receiver for the
 property of the insolvent is necessary —

It is ordered that a receiving order be made against the insolvent
 and a receiving order is hereby made against the insolvent and A B
 of [or the Official Receiver] is hereby constituted
 Receiver of the property of the said insolvent And it is
 further ordered that the said Receiver (not being the Official Receiver)
 do give security to the extent of _____ and that his remuneration
 be fixed at _____

Dated this _____ day of _____ 19
 _____ Judge

CIVIL PROCESS No 149

NOTICE TO PERSONS CLAIMING TO BE CREDITORS OF INTENTION TO DECLARE FINAL DIVIDEND

[Section 64 of the Provincial Insolvency Act V of 1920]

In the Court of District Judge at _____
 in the matter of _____ Insolvency Application No _____ of 19
 _____ Applicant

Take notice that a final dividend is intended to be declared in the
 above matter, and that if you do not establish your claim to the satis-
 faction of the Court on or before the _____ day of
 19 _____, or such later day as the Court may fix your claim will be
 expunged, and I shall proceed to make a final dividend without regard
 to such claim

To X Y Dated this _____ day of _____ 19

G H
 Receiver [Address]

CIVIL PROCESS No 150

SUMMARY ADMINISTRATION NOTICE TO CREDITORS

[Section 74 of the Provincial Insolvency Act V of 1920]

In the Court of the District Judge at
Insolvency case No of 19

Applicant
19

Take notice that on the _____ day of _____ 19____
the abovenamed debtor presented a petition to this Court praying to
be adjudicated an insolvent and that on the _____ day of _____
19____, the Court being satisfied that the property of the debtor is not
likely to exceed Rs 500, directed that the debtor's estate be adminis-
tered in a summary manner and appointed the _____ day of _____
19____ for the further hearing of the said petition
and examination of the said debtor

Also take notice that the Court may on the aforesaid date then and there proceed to adjudication and distribution of the assets of the aforesaid debtor. It will be open to you to appear and give evidence on the date. Proof of any claim you desire to make must be lodged in Court on or before that date.

Given under my hand and the seal of this Court
day of 19

1035

By order of the High Court,
N G A EDGLEY,
Registrar

[Vide Calcutta Gazette, dated 8th June 1921]

APPENDIX B.

THE MADRAS PROVINCIAL INSOLVENCY RULES, 1922.

[Notification published in the Fort St George Gazette"
of the 25th April 1922]

By virtue of the provisions of section 79 of the Provincial Insolvency Act, 1920, and of all other powers thereunto enabling, and with the previous sanction of His Excellency, the Governor in Council, the High Court of Judicature at Madras has made the following rules for carrying into effect the provisions of the said Act —

I These Rules may be called "The Madras Provincial Insolvency Rules, 1922," and shall apply to all proceedings under the Provincial Insolvency Act, 1920, in any Court subordinate to the High Court of Judicature at Madras. They shall come into force on the first day of May, 1922 and shall apply to all proceedings thereafter instituted and, as far as may be, to all proceedings then pending.

Title and application

II The forms mentioned in these Rules are the forms in the Appendix hereto and shall be used with such variations as circumstances may require.

Forms

III (1) In these Rules unless there is anything repugnant in the subject or context, "the Act" means the Provincial Insolvency Act, 1920,

Definition

"the Court" includes a Receiver exercising the powers of the Court in accordance with section 80 of the Act

"Receiver" means a Receiver appointed by the Court under section 56 (1) of the Act,

"Interim Receiver" means a Receiver appointed by the Court under section 20 of the Act,

"proved debt" means the claim of a creditor so far as it has been admitted by the Court

(2) Save as otherwise provided all words and expressions used in these Rules shall have the same meaning as those assigned to them in the Act

IV (1) Every petition application, affidavit or order in any proceeding under the Act or under these rules shall be headed by a cause-title in Form No 1

Cause title and number

(2) When an insolvency petition is admitted, the chief ministerial officer of the Court shall assign a distinctive serial number to the petition and all subsequent proceedings on the petition shall bear that number

APPENDIX B.

THE MADRAS PROVINCIAL INSOLVENCY RULES, 1922

*[Notification published in the Fort St George Gazette
of the 25th April 1922]*

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II The forms mentioned in these Rules are the forms in the Appendix hereto and shall be used with such variations as circumstances may require

III (1) In these Rules unless there is anything repugnant in the subject or context the Act means the Provincial Insolvency Act 1920

Definition

the Court includes a Receiver exercising the powers of the Court in accordance with section 80 of the Act

Receiver means a Receiver appointed by the Court under section 56 (1) of the Act

Interim Receiver means a Receiver appointed by the Court under section 20 of the Act

proved debt means the claim of a creditor so far as it has been admitted by the Court

(2) Save as otherwise provided all words and expressions used in these Rules shall have the same meaning as those assigned to them in the Act

IV (1) Every petition application affidavit or order in any proceeding under the Act or under these rules shall be headed by a cause title in Form No 1

Cause title and number

(2) When an insolvency petition is admitted the chief ministerial officer of the Court shall assign a distinctive serial number to the petition and all subsequent proceedings on the petition shall bear that number

V (1) When an insolvency petition presented by a creditor is admitted, the creditor shall within seven days thereafter furnish a copy of the petition for service on the debtor or, if there are more debtors than one, as many copies as there are debtors and the chief ministerial officer of the Court shall sign the copy or copies if on examination he finds them to be correct

Creditor to furnish copies of his petition

(2) The copy shall be served together with the notice of the order fixing the date for hearing the petition on the debtor or upon the person upon whom the Court orders notice to be served

Particulars in debtor's petition

VI Particulars to be given under section 13 (1) of the Act shall be in Form No 2

VII If a debtor against whom an insolvency petition has been admitted dies before the hearing of the petition the Court may order that notice of the order fixing the date for hearing the petition shall be served on his legal representative or on such other person as the Court may think fit in the manner provided for the service of summons

Death of debtor before hearing of petition

VIII (1) Unless otherwise ordered, all claims shall be proved by affidavit in Form No 3 in the manner provided in section 49 of the Act, provided that before admitting any claim the Court may call for further evidence

Proof of debts

(2) The affidavit may be made by the creditor or by some person authorised by him, provided that if the deponent is not the creditor the affidavit shall state the deponent's authority and means of knowledge

(3) As soon as may be after proof of any debt is tendered, the Court shall by order in writing admit the creditor's claim in whole or in part or reject it, provided that when a claim is rejected in whole or in part the order shall state briefly the reasons for the rejection

(c) A copy of every order rejecting a claim, or admitting it in part only, shall be sent by the Court by registered post to the person making the claim within seven days from the date of the order

IX As soon as the schedule of creditors has been framed a copy thereof shall, if a Receiver or *Interim Receiver* has been appointed, be supplied to him and all subsequent entries and alterations made therein shall be communicated to the Receiver or *Interim Receiver*

Schedule of creditors

X (1) If a debtor submits a proposal under section 38 (1) of the Act, the Court shall fix a date for the consideration of the proposal and notice thereof together with a copy of the terms of the proposal shall be sent to every creditor who has proved

Consideration of compositions and schemes of agreement

(2) At the meeting for the consideration of the proposal the debtor shall be entitled to address the Court in person or by pleader in support of the proposal and every creditor who has proved shall be entitled in person or by pleader to question the debtor and to address the Court

XI (1) Every appointment of a Receiver or *Interim* Receiver shall be by order in writing signed by the Court
 Appointment of and security from Receiver and *Interim* Receiver
 Copies of this order sealed with the seal of the Court shall be served on the debtor and forwarded to the person appointed

(2) Every Receiver or *Interim* Receiver other than an Official Receiver shall be required to give such security as the Court thinks fit

(3) The Court shall not require an Official Receiver to give security

(4) In cases where the Official Receiver is empowered to make orders of adjudication, he shall send a copy of every order of adjudication made by him to the Court in which the proceedings are pending, and may apply that he may be appointed Receiver for the property of the insolvent

(5) The Court may thereupon appoint the Official Receiver to be receiver for the property of the insolvent and, unless it sees fit to do so, it shall not be necessary to give notice of the application to any person

Provided that any part of the proceedings may apply to the Court, upon notice to the Official Receiver and the insolvent, that the appointment of the Official Receiver may be set aside or that a special receiver may be appointed in his place

XII (1) The Court may remove or discharge any Receiver, or *Interim* Receiver other than an Official Receiver, and any Receiver or *Interim* Receiver so removed or discharged shall, unless the Court otherwise orders deliver up any assets of the debtor in his hands and any books accounts or other documents relating to the debtor's property which are in his possession or under his control to such person as the Court may direct
 Removal or discharge of Receiver or *Interim* Receiver

(2) If an order of adjudication is annulled, the Receiver (if any) shall, unless the Court otherwise orders deliver up any assets of the debtor in his hands and any books accounts or other documents relating to the debtor's property which are in his possession or under his control to the debtor or to such other person as the Court may direct

XIII Every Receiver or *Interim* Receiver shall be deemed for the purpose of the Act and of these rules to be an officer of the Court
 Receiver or *Interim* Receiver an officer of the Court

XIV (1) Every application to the Court made by a Receiver or an *Interim* Receiver shall be in writing
 Application by Receiver or *Interim* Receiver

(2) The Court may order that notice of any application by the Receiver or *Interim* Receiver and of the date fixed for the hearing of the application shall be sent by registered post to all creditors who have proved

XV (1) The remuneration of Receivers or *Interim* Receivers other than Official Receivers shall be in such proportion to the amount of the dividends distributed as the Court may direct, provided that it does not exceed five *per centum* of the amount of the dividends
 Remuneration of Receivers

(2) If a Receiver other than the Official Receiver has been appointed in an insolvency in which the Court makes an order approving a proposal under section 36 (7) of the Act, the remuneration to be paid to the Receiver shall be fixed by the Court, and the order approving the proposal shall make provision for the payment of the remuneration and shall be subject to the payment thereof.

XVI (1) Unless the Court otherwise directs, the Receiver or Interim

Receiver's report

Receiver shall as soon as may be after his appointment, and in any case before the hearing of the debtor's application for discharge, draw up a report upon the cause of the debtor's insolvency, the conduct of the debtor so far as it may have contributed to his insolvency and also his conduct during the insolvency proceedings in all matters connected with such proceedings and in particular such report shall state (a) whether the value of the debtor's assets is less than half his unsecured liabilities and if so whether that fact is due to circumstances for which the debtor cannot justly be held responsible, (b) whether the debtor has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency, (c) whether the debtor has continued to trade after knowing himself to be insolvent (d) whether the debtor has contracted any debt provable under the Act without having at the time of contracting it any reasonable or probable ground of expectation that he would be able to pay it, (e) whether the debtor has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities (f) whether the debtor has brought on, or contributed to, his insolvency by rash and hazardous speculations or by unjustifiable extravagance in living or by gambling or by culpable neglect of his business affairs (g) whether the debtor has, within three months preceding the date of the presentation of the petition when unable to pay his debts as they became due, given an undue preference to any of his creditors, (h) whether the debtor has on any previous occasion been adjudged an insolvent or made a composition or arrangement with his creditors, and (i) whether the debtor has concealed or removed his property or any part of it or has been guilty of any other fraud or fraudulent breach of trust.

(2) If the debtor submits a proposal under section 38 (1) of the Act, the Receiver shall state in his report whether in his opinion the proposal is reasonable and is likely to benefit the general body of the creditors and shall state the reasons for his opinion.

XVII Unless the Court otherwise directs, the debtor shall furnish

Debtor to furnish accounts

the Receiver or Interim Receiver or, if a Receiver or Interim Receiver has not been appointed the Court with a trading account and an account showing all moneys and securities paid, disposed of or encumbered or recovered by or from the debtors or on his account and his income and the source thereof for such period as the Receiver or Interim Receiver or if a Receiver or Interim Receiver has not been

appointed, the Court may direct, provided that the Receiver or *Interim Receiver* shall not, without the previous sanction of the Court, direct the debtor to furnish accounts for more than two years before the date of the presentation of the insolvency petition

XVIII (1) The Receiver or *Interim Receiver* shall keep a cash book and such books and other papers as are necessary to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate

(2) The accounts of Official Receivers shall be audited annually by the Accountant-General

(3) The cost of such audit, calculated at 12 annas per Rupees one hundred on the amount realized since the last audit of the estate concerned shall be paid by the Official Receiver from such amount and, in case a distribution thereof to creditors is ordered in any year before the audit has taken place, shall be reserved for such payment from the amount otherwise available for distribution

XIX (1) No dividend shall be distributed by a Receiver without the previous sanction of the Court

(2) Notice in Form No 8 or Form No 9, as may be appropriate, that the distribution of a dividend has been sanctioned shall be sent by the Receiver or, if there is no Receiver, by the Court to every creditor, who has proved a debt, by registered post within one month from the date of the order sanctioning the distribution

(3) The amount of any dividend due to a creditor may at his request be transmitted to him by postal money order at his risk and expense and, if the amount does not exceed Rs 5, shall be so transmitted, unless he appears to claim it in person or by duly authorized agent before the Receiver or, if there is no Receiver, before the Court within two months from the date of the order sanctioning the distribution of the dividend

(4) An order shall not be made under section 65 of the Act without giving the Receiver opportunity to show cause why the order should not be made

XX (1) An application for discharge shall not be heard until after the schedule of creditors has been framed

(2) Every creditor who has proved shall be entitled in person or by pleader to appear at the hearing and oppose the discharge, provided that he has served upon the insolvent and upon the Receiver (if any) not less than seven days before the date fixed for the hearing a notice stating the grounds of his opposition to the discharge

(3) A creditor who has not served the prescribed notices shall not unless the Court otherwise directs, be permitted to oppose the discharge of the debtor, and a creditor who has served the prescribed notices shall not be permitted, unless the Court otherwise directs, to oppose the discharge on any ground not specified in the notice

(4) At the hearing of the application the Court may hear any evidence which may be tendered by a creditor who has served the prescribed notices, or by the Receiver, and also any evidence which may be tendered on behalf of the debtor and shall examine the debtor, if necessary, for the purpose of explaining any evidence tendered and may hear the Receiver, the debtor, in person or by pleader, and any creditor in person or by pleader, who has served the prescribed notice

XXI (1) The notices to be given under sections 19 (2), 30, 37 (2) 38 (1) and 41 (1) of the Act shall be published in the *Fort St George Gazette* in English, in the District Gazette in English and in the language of the Court and in such other manner, if any, as the Court may direct and copies of the notices in English and in the language of the Court shall be affixed to the notice board of the Court

Notices

(2) The notices to be given under sections 19 (2) 38 (1) and 41 (1) of the Act shall be published and affixed in the manner provided in paragraph (1) of this rule not less than fourteen days before the date fixed for the hearing of the application, the consideration of the proposal or the hearing of the application of the proposal, or the hearing of the application for discharge as the case may be

(3) Notice of the date fixed for the hearing of an insolvency petition under section 19 (1) of the Act shall be sent by the Court by registered post, if the petition is by the debtor, to all creditors mentioned in the petition, and if the petition is by a creditor, to the debtor, not less than fourteen days before the said date

(4) The notice to be given under section 33 (3) of the Act shall be served only on the debtor and on the creditors who have proved their debts and may, if the Court so directs, be served on any or all such creditors by registered post

(5) Notice of the date fixed for the consideration of a proposal under section 38 (1) of the Act shall be sent by the Court by registered post to all creditors who have tendered proof of their debts not less than fourteen days before the said date

(6) Notices of the date fixed for the hearing of an application for discharge under section 41 (1) of the Act shall be despatched by the Court by registered post to all persons whose names have been entered in the schedule of creditors not less than fourteen days before the said date

(7) The notice to be given under section 64 of the Act shall be sent by the Receiver by registered post to all persons whose claims to be creditors have been notified but not proved not less than one calendar month before the limit of time fixed for proving claims

(8) It shall not be necessary to give notice of date to which the hearing of a petition or of an application for discharge or the consideration of a proposal is adjourned

(9) The notice of an order of adjudication to be published under section 30 of the Act shall contain a statement that creditors should prove their claims as soon as possible and that a claim may be proved by delivering or sending by registered post to the Court or Official Receiver, as the case may be, an affidavit in Form No. 3

XXII (1) All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting them, but when an order of adjudication has been made, the costs of the petitioning creditor including the costs of the publication of all Gazette notices required by the Act or Rules which, by the Act or rules, the petitioning creditor is required to pay, shall be taxed and be payable out of the estate

(2) Before making an order on an insolvency petition presented by a debtor, the Court may require the debtor to deposit in Court a sum sufficient to cover the costs sending the prescribed notices of the hearing of petition and the costs of the publication of all Gazette notices required by the Act or Rules which, by the Act or Rules, the debtor is required to pay

(3) The cost of the publication in the Gazette —

(a) An order fixing the date for the hearing of an insolvency petition under section 19 (2) shall, when the petition is by the creditor, be paid by the creditor, and, when the petition is by the debtor be paid out of the sum deposited in Court by the debtor under rule XXII (2)

(b) Notice of a proposal for a compensation under section 38 (1) and notice of an application for discharge under section 41 (1) shall be paid by the debtor,

(4) The publication in the Gazette of —

(a) *Notice of adjudication under section 30*

(b) Notice to creditors whose claims have been notified but not proved under section 64

(c) Notice of an order annulling an adjudication under section 37 (2), shall be free of charge

(5) No costs incurred by a debtor of, or incidental to, an application to approve a composition or scheme shall be allowed out of the estate if the Court refuses to approve the composition or scheme

(6) If the assets available are not sufficient in any case for taking proceedings necessary for the administration of the estate, the Receiver or *Interim* Receiver or Official Receiver, as the case may be, may call upon the creditors or any of them to advance the necessary funds or to indemnify him against the cost of such proceedings Any assets realized by such proceedings shall be applied, in the first place, towards the repay-

ment of such advances, with interest thereon at 6 per cent per annum.

Summary administration XXIII If the Court makes an order under section 74 of the Act that the debtor's estate be administered in a summary manner —

(a) the petition and all subsequent proceedings shall be endorsed 'Summary Case',

(b) the Receiver or *Interim* Receiver shall not carry on the business of the debtor under clause (c) of section 59 of the Act, nor institute any suit under clause (d) of the said section, nor accept as the consideration for the sale of any property of the debtor a sum of money payable at a future time under clause (f), nor mortgage, nor pledge, any part of the property of the debtor under clause (g)

Inspection of proceedings XXIV All insolvency proceedings may be inspected at such times and subject to such restrictions as the Court may prescribe by the Receiver or *Interim* Receiver, the debtor, any creditor who has proved or any legal representative on their behalf

Maintenance of registers XXV All Courts and Official Receivers shall maintain registers of (1) insolvency petitions received (2) insolvency petitions disposed of, and (3) proceedings in insolvency subsequent to orders of adjudication in the Forms Nos 4, 5 and 6 in the appendix to these rules. They shall also submit to the High Court on the 15th day after the close of each quarter a return of all proceedings in insolvency in Form No 7

Maintenance of registers XXVI In addition to the registers prescribed in rule XXV, Official Receivers shall maintain (1) a dividend register, (2) a register of assets and (3) a document register (inventory) in Forms Nos 11 and 12 appended to these rules

Expenditure on journeys undertaken for purposes of administration XXVII Expenditure incurred by an Official Receiver and on journeys undertaken for the purpose of administration will be recoverable from the Official Receiver from the assets or estates concerned in accordance with the rules made by the High Court to time in that behalf

Proceedings by or against a firm XXVIII (1) When any petition, notice or other document is served by a firm of creditors or debtors, the partner signing it shall add also his own signature in the said manner, B and Co., by A B a partner in the said

(2) Any petition or notice of which personal service shall be deemed to be duly served on all member partners or upon any person having at the time or management of the partnership business there

(3) Where a firm of debtors file an insolvency petition, the same shall contain the names in full of the individual partners, and unless it is signed by all of them, it shall be accompanied by the affidavit of the partner signing it that all the partners concur in the filing of the same

(4) When a creditor files an insolvency petition against a firm, the same shall state the names of the individual partners so far as the same ~~are~~ known to the petitioner, and the debtors shall together with their full of affairs file an affidavit setting out the names in full of the individual partners

(5) An order of adjudication shall be made against the partners individually

(6) The debtors shall submit a schedule of their partnership affairs
each debtor shall submit a schedule of his separate affairs

APPENDIX C.

ALLAHABAD HIGH COURT RULES.

NOTIFICATION NO 1166/47—1 (4) of 1922

RULES FRAMED UNDER SECTION 79, THE PROVINCIAL INSOLVENCY ACT, V OF 1920

The following amendments are made in the General Rules (Civil) of 1911, with the previous approval of Government as required by section 79 of the Provincial Insolvency Act V of 1920 —

For the rules in Chapter XIX substitute the following rules —

1 This rules may be cited as "The Agra Provincial Insolvency Rules" The Forms Nos 138 to 152 (shown in Volume II, Appendices) with such variations as circumstances may require shall be used for the matters to which they severally relate

2 Every insolvency petition shall be entered in the Register of Insolvency Petitions (Form No 80) to be maintained in all courts exercising insolvency jurisdiction and shall be given a serial number in that register and all subsequent proceedings in the same matter shall bear the same number

3 All insolvency proceedings may be inspected by the Receiver, the debtor, and any creditor who has tendered proof of his debt, or any legal representative on their behalf at such times and subject to the same rules as other court records

Notices

4 Whenever publication of any notice or other matter is required by the Act to be made in an Official Gazette, or is required by the rules framed under the Act to be made in a local newspaper, a memorandum referring to and giving the date of such advertisement shall be filed with the record and noted in the other sheet,

5 Notice of an order fixing the date of the hearing of a petition under section 19 (2) shall, in addition to the publication thereof in the local official gazette as required by the Act, be also advertised in such newspaper or newspapers as the Court may direct

A copy of the notice shall also be forwarded by registered letter to each creditor to the address given in the petition The same procedure shall be followed in respect of notices of the date for the consideration of a proposal for composition or scheme of arrangement under section 38 (1)

6 Notice of an order of adjudication under section 30 which is required by the Act to be published in the local official gazette shall also be published in such local newspaper or newspapers as the court may

think fit When the debtor is a Government servant, a copy of the order shall sent to the Head of the office in which he is employed

The same procedure shall be followed in regard to notices or orders annulling an adjudication under section 37 (2)

7 The notice to be given by the court under section 50 shall be served on the creditor or his pleader or shall be sent through the post by registered letter

8 The notice to be issued by the Receiver under section 64 before the declaration of a final dividend to the persons whose claims to be creditors have been notified but not proved shall be sent through the post by registered letter

9 Notices of the date of hearing of applications for discharge under section 41 (1) shall be published in the local official gazette and in such local newspapers as the Judge may direct and copies shall be sent by registered post to all creditors whether they have proved or not

10 A certificate of an officer of the court or of the Official Receiver or an affidavit by a Receiver that any of the notices referred to in the preceding rules has been duly posted accompanied by the post office receipt, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed

11 In addition to the prescribed methods of publication any notice may be published otherwise in such manner as the Court may direct, for instance by affixing copies in the court house or by beat of drum in the village in which the insolvent resides

Receivers

12 Every appointment of a Receiver shall be by order in writing signed by the court Copies of this order sealed with the seal of the court shall be served on the debtor and forwarded to the person appointed

13 (a) A court when fixing the remuneration of a Receiver shall as a rule direct it to be in the nature of a commission or percentage of which one part shall be payable on the amount realized after deducting any sum paid to secured creditors out of the proceeds of their securities and the other part on the amount distributed in dividends

(b) When a Receiver realizes the security of a secured creditor the court may direct additional remuneration to be paid to him with reference to the amount of work done by him and the benefit resulting therefrom to the creditors

14 The Receiver shall keep a cash book and such books and other papers as to give a correct view of his administration of the estate and shall submit his accounts in such forms as the court may direct Such accounts shall be audited by such person or persons as the court may direct The costs of the audit shall be fixed by the court and shall be paid out of the estate

15 The Receiver shall ordinarily deposit the money realized by him in the Government Treasury or whenever for any particular reason

money in any case is placed in a bank approved by the Court in fixed deposit bearing interest, the amount of interest shall be credited to the estate

16 The Receiver shall submit to the court each quarter not later than the 10th day of the month next succeeding the quarter to which it relates, an account showing all the receipts and disbursements in the case or cases in which he is Receiver

17 Whenever there are no funds in the estate and the Receiver receives financial help from any creditor he should show in the accounts of the estate the amount so received

18 Any creditor who has proved his debt may apply to the court for a copy of the Receiver's accounts (or any part thereof) relating to the estate, as shown by the cash book up to date, and shall be entitled to such copy on payment of the charges laid down in the rules of this Court regarding the grant of copies No court fee will be required for such copies

19 In any case in which a meeting of creditors is necessary and in any case in which the debtor proposes a composition or scheme under section 38, the Receiver shall give at least 14 days' notice to the debtor and to every creditor of the time and place appointed for each meeting Such notices shall be served by registered post

Proof of debts

20 A creditor's proof may be in Form No 143 in the Appendix with such variations as circumstances may require

21 In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made by the debtor or by some other person on behalf of all such creditors Such proof should be in Form No 144 in the Appendix

Procedure where the debtor is a firm

22 Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm's name, the partner signing for the firm shall also add his own signature e.g. "Brown and Co, by James Green, partner in the said firm"

23 Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the court upon partners, or upon any person having at the time of service the control or management of the partnership business there

24 The provisions of the last preceding rule shall, so far as the nature of the case will admit, apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own

25 Where a firm of debtors file an insolvency petition the same shall contain the names in full of the individual partners, and if such

petition is signed in the firm's name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same

26 An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm

27 In cases of partnership the debtors shall submit a schedule of their partnership affairs, and each debtor shall submit a schedule of his separate affairs

28 The joint creditors and each set of separate creditors may severally accept compositions or schemes of arrangements So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted

29 Where proposals for compositions or schemes are made by a firm and by the partners therein individually the proposal made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors and the proposal made to each separate set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors Such proposal may vary in character and amount Where a composition or scheme is approved the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme

30 If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm And when any surplus shall arise upon the administration of the assets of such separate or independent firm the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein

Applications and notices

31 (a) Every application to the court either by the Receiver or by any creditor or by any person either claiming to be entitled to any alleged assets of the debtor, or complaining of any act of the Receiver, and in particular and without prejudice to the generality of this rule, for an order deciding any question under sections 4 51 52 53 54 and 55 or any one of them shall (unless otherwise provided by these rules, or unless the court shall in any particular case otherwise direct) be made by application in writing and shall be supported by an affidavit by the applicant

(b) Every such application shall state in substance the nature of the order or relief applied for the sections of the Act under which such application is made the grounds upon which such order or relief is claimed, and the sections of any other Act relied upon

(c) Every such application shall also state whether the applicant desires or intends to call witnesses at the hearing in support thereof and shall specify with precise identification the documents upon which the applicant intends to rely

(d) Where such application is made by an applicant other than the Receiver, a copy of such application, and a copy of the affidavit in support thereof shall be served upon the Receiver together with copies of the documents upon which the applicant intends to rely as mentioned in sub section (c) hereof, unless the number or volume of such documents is exceptionally great in which case notice of the fact shall be given to the Receiver and an opportunity shall be afforded to the Receiver of examining the originals seven clear days at least before the hearing

(e) Where such application is made by the Receiver, the affidavit in support thereof shall identify any statement of the debtor made to the Receiver, which is either on the file or in the Receiver's possession and on which the Receiver intends to rely

(f) Any party to the application shall be entitled to inspect the original of any document which has been either filed or mentioned in the affidavit made in support of such application, or of which any copy has been exhibited to such affidavit

(g) A copy of every application mentioned in sub section (a) hereof and of the affidavit in support of such application shall be served upon the Receiver whether or not any relief or order is expressly claimed against him

Sale of immoveable property of insolvent

32 If no Receiver is appointed and the court, in exercise of its powers under section 58 of the Act, sells any immoveable property of the insolvent the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall be signed by the presiding officer of the court. The cost of registration [if any] will also be borne by the purchaser

Dividends

33 The amount of the dividend may at the request and risk of the creditor be transmitted to him by post

Summary Administration

34 When an estate is ordered to be administered in a summary manner under section 74 of the Act, the provisions of the Act and Rules shall subject to any special direction of the court, be modified as follows namely —

(i) There shall be no advertisement of any proceedings in the official gazette or a local paper

(ii) The petition and all subsequent proceedings shall be endorsed "summary case"

(ui) The notice of the hearing of the petition to the creditors shall be in Form No 151 in the Appendix

(iv) The court shall examine the debtor as to his affairs but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross examine the debtor

(v) The appointment of a Receiver will often not be necessary and the court may act under section 53 of the Act in order to reduce the cost of the proceedings

Costs

35 All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting the same, but when an order of adjudication has been made, the costs of the petitioning creditor shall be taxed and be payable out of the estate

36 No costs incurred by a debtor of or incidental to, an application to approve of a composition or scheme, shall be allowed out of the estate if the court refused to approve the composition or scheme

37 Where an order of adjudication is made on a debtor's petition and the court is satisfied that the debtor is unable to pay the cost of publication in the local official gazette, of the notice required by section 30 of the Act, the court shall direct that such cost be met from the sale proceeds of the property, of the insolvent. If the insolvent has no property or if the sale proceeds are insufficient, such cost or the irrecoverable balance thereof, shall be remitted

For the Forms Nos 138 to 151, Volume II, substitute the following Forms Nos 138 to 152 —

FORM NO 138

General Title.

IN THE COURT OF

Insolvency Petition No *of 19*

IN THE MATTER OF

Ex parte (here insert 'the debtor' or A B or 'creditor' or 'the Official Receiver' or "the Receiver")

FORM NO 139

Debtor's Petition.*(Section 13 of the Provincial Insolvency Act, V of 1920)*

(TITLE)

I (a) ordinarily residing at (or "carrying on business at," or "personally working for gain at" or "in custody at)" in consequence of the order of (b) being unable to pay my debts, hereby petition that I may be adjudged an insolvent. The total amount of pecuniary claims against me is Rs (c) as set out in detail in Schedule A annexed hereunto which contains the names and residences of all my creditors, so far as they are known to or can be ascertained by me. The amount and particulars of all my property are set out in Schedule B annexed hereunto together with a specification of all my property, not consisting of money, and the place or places at which such property is to be found and I hereby declare that I am willing to place all such property at the disposal of the court save in so far as it includes such particulars (not being my books of accounts) as are exempted by law from attachment and sale in execution of a decree.

I have not on any previous occasion filed a petition to be adjudged an insolvent, or, I set out in Schedule C particulars (d) relating to my previous petition to be adjudged an insolvent, petitions

(d) The particulars required are—

- (i) Where a petition has been dismissed, reasons for such dismissal
- (ii) Where the debtor has previously been adjudged an insolvent, concise particulars of the insolvency, including a statement whether any previous adjudication has been annulled and if so the grounds therefor

Verification clause as in plaints

Signature

FORM No 140

**Notice to creditors of the date of hearing of an
Insolvency Petition.***Section 19*

(TITLE)

Where A B has applied to this court, by petition, dated of 19 , to be declared an insolvent under the Provincial Insolvency Act, V of 1920, and your name appears in the list of creditors filed by the aforesaid debtor, this is to give notice that the court has fixed the day of 19 , for the hearing of the aforesaid petition and the examination of the debtor. If you desire to be represented in the matter you should attend in person or by duly instructed pleader. The particulars of the debt alleged in the petition to be due to you are as follows —

Judge

FORM No 141

Order of Adjudication.*Section 27*

(TITLE)

Pursuant to a petition, dated against (here insert name, description and address of the debtor) and on the application of (here insert "Official Receiver" or 'the debtor himself, or "A B of a creditor') and on reading and hearing it is ordered that the debtor be and the said debtor is hereby adjudicated insolvent

Dated this day of 19

Judge

FORM No 142

Order appointing a Receiver.*Section 56*

(TITLE)

Whereas pursuant to his application, dated A B was adjudicated an insolvent by order of this court, dated , and it appears to the court that the appointment of a receiver for the property of the insolvent is necessary

It is ordered that a receiving order be made against the insolvent and receiving order is hereby made against the insolvent and A B of (or the Official Receiver) is hereby constituted Receiver of the property of the said insolvent. And it is further ordered that the said Receiver (not being the Official Receiver) do give security to the extent of—and that his remuneration be fixed at

Dated

Judge.

FORM No 143
Proof of debt. General Form.
 Section 49
 (TITLE)

In the matter of No. _____

(a) Here insert number given in the notice (a) of 19 _____, I (b) make oath and say (or solemnly and sincerely affirm and declare),

(b) Address in full _____

1 That the said _____ ^{was} _{were} at the date of the petition, viz. the _____ day of _____ 19 _____ and still ^{is} _{are} justly and truly indebted to me as the sum of Rs _____ as p _____ for () as shown by the account endorsed hereon (of the following account) viz., for which sum or any part thereof I say that I have not, nor hath _____ or any person by _____ or to my knowledge or belief for _____ we had received any manner of satisfaction or security whatsoever save and except the following (d)

(c) State consideration and specify the vouchers (if any) in support of the claim

(d) Here details of securities bills or the like

Admitted to vote for Rs _____

Judge or Official Receiver _____

} Sworn at
 this _____ day of _____
 before me _____ } Deponent's signature
 Commissioner

FORM No 144
Proof of debt of Workmen. Sections 49 and 61.
 (TITLE)

1 (a) of (b) make oath and say —(or solemnly and sincerely affirm and declare)

1 That (c) ^{was} _{were} at the date of the adjudication viz., the _____ day of 19 _____, and still ^{am} _{are} justly and truly indebted to the several persons whose names, addresses and descriptions appear in the schedule endorsed hereon in sums severally set against the names in the sixth column of such schedule for wages due to them respectively as workmen or others in (d) in respect of services rendered by them respectively to (e) during such period before the date of the receiving order as are set out against their respective names in the fifth column of such schedule, for which said sums, or any part thereof, I say that they have not, nor hath any of them had or received any manner of satisfaction or security whatsoever

(a) Fill in full name address and occupation of deponent

(b) The abovenamed debtor or the foreman of the abovenamed debtor or on behalf of the workmen and others employed by the abovenamed debtor

(c) I or the said _____

(d) My employ or the employ of the abovenamed debtor

(d) Me or the abovenamed debtor

Form of notice under section 64.*Notice to persons claiming to be creditors of intention to declare final dividends*

(TITLE)

Take notice that a final dividend is intended to be declared in the above matter, and that if you do not establish your claim to the satisfaction of the court on or before the day of 19 , or such later day as the court may fix, your claim will be expunged and I shall proceed to make a final dividend without regard to such claim.

Dated day of 19

(Sd) G H
Receiver

To X Y (Address)

FORM No 148**Order annulling adjudication under section 35.**

(TITLE)

On the application of R S of , and on reading and hearing , it is ordered that the order of adjudication, dated against A B of , be and the same is hereby annulled

Dated this day of 19

Judge

FORM No 149**Notice to creditors of application for discharge.***Section 41 (1)*

(TITLE)

Take notice that the abovenamed insolvent has applied at the court for the discharge, and that the court has fixed the day of 19 at o'clock for hearing the application

Dated this day of 19

Judge

Note—On the back of this notice the provisions of section 42 (1), Act V of 1920, should be printed

FORM No 150**Order of Discharge subject to conditions as to earning after-acquired property and income.***Section 41 (2), (a), (b) or (c)*

(TITLE)

On the application of adjudged insolvent on the day of 19 and upon taking into consideration the report of the Official Receiver (or

Receiver) as to the insolvent's conduct and affairs and hearing A B and C D creditors

It is ordered that the insolvent (a) be discharged forthwith, or
(b) be discharged on the _____, or

(c) be discharged subject to the following conditions as to his future earnings after acquired property and income —

After setting aside out of the insolvent's earnings, after acquired property, and income the yearly sum of Rs _____ for the support of himself and his family the insolvent shall pay the surplus if any (or such portion of such surplus as the court may determine), of such earnings after acquired property and income to the court or official Receiver (or Receiver) for distribution among the creditors in the insolvency. An account shall on the first day of January in every year, or within fourteen days thereafter be filed in these proceedings by the insolvent setting forth a statement of his receipts from earnings, after-acquired property and income during the year immediately preceding the said date and the surplus payable under this order shall be paid by the insolvent into court or to the Official Receiver (or Receiver) within fourteen days of the filing of the said account

Dated this _____ day of _____ 19 _____

Judge

FORM No 151

Summary administration (section 74)

(TITLE)

Notice to creditors

Take notice that on the _____ day of _____ 19 _____, the above-named debtor presented a petition to this court praying to be adjudicated an insolvent and that on the _____ day of _____ 19 _____, the court being satisfied that the property of the debtor is not likely to exceed Rs 500, directed that the debtor's estate be administered in a summary manner and appointed the _____ day of _____ 19 _____, for further hearing of the said petition and the examination of the said debtor

Also take notice that the court may on the aforesaid date then and there proceed to adjudication and distribution of the assets of the aforesaid debtor. It will be open to you to appear and give evidence on that date. Proof of any claim you desire to make must be lodged in court, on or before that date

Given under my hand and the seal of this court the _____ day of _____ 19 _____

Judge

FORM No 152

Notice of application by unscheduled creditor.*Section 33 (3), Act V of 1920*

(TITLE)

To

Whereas an application has been made to this court by who claims to be a creditor of whose application to be declared an insolvent was filed in this court on the day of 19 , for permission to produce evidence of the amount and particulars of his pecuniary claims against the insolvent, and for an order directing his name to be entered in the schedule as a creditor for the debts which he may prove This is to give you notice that the said application will be heard in this court on the day of 19 , when you should appear personally, or by pleader, if you desire to object to it

Given under my hand and the seal of the Court this the
day of 19

By order of the Court,
J N G JOHNSON, J.C.S.,
Registrar

APPENDIX D.

BOMBAY HIGH COURT RULES

No 5730 —By virtue of the provisions of section 79 of the Provincial Insolvency Act (V of 1920), and of all other powers thereunto enabling the High Court of Judicature at Bombay, has with the previous sanction of His Excellency the Governor in Council, and in supersession of the Bombay Provincial Insolvency Rules, 1909 made the following rules for carrying into effect the provisions of the said Act —

I —The rules may be called The Bombay Provincial Insolvency Rules 1924, and shall apply to all proceedings under the Provincial Insolvency Act 1920, in any Court subordinate to the High Court of Judicature at Bombay They shall come into force on the 1st day of December, 1924, and shall apply to all proceedings thereafter instituted and, as far as may be to all proceedings then pending

II —The forms mentioned in these rule are the forms in the Appendix hereto and shall be used with such variations as circumstances may require

III —(1) In these rules unless there is anything repugnant in the subject or context —

“the Act” means the Provincial Insolvency Act, V of 1920,

“the Court” includes a receiver when exercising the powers of the Court in accordance with section 80 of the Act,

“receiver” means a receiver appointed by the Court under section 56 (1) of the Act, and (except where the context otherwise requires) includes an Official Receiver,

“interim receiver” means receiver appointed by the Court under section 20 of the Act,

“proved debt” means the claim of a creditor so far as it has been admitted by the Court

(2) Save as otherwise provided, all words and expressions used in these rules shall have the same meaning as those assigned to them in the Act

Petitions.

IV —(1) Every Insolvency petition shall be entered in the Register of Insolvency Petitions to be maintained in Form No 17 in all Courts exercising insolvency jurisdiction and shall be given a serial number in that register and all subsequent proceedings in the same matter shall bear the same number

(2) Every petition, application, affidavit or order in any proceeding under the Act or under these rules shall be headed by a cause title in Form No 1

V—(1) When an insolvency petition presented by a creditor is admitted, the creditor shall, within seven days thereafter, furnish a copy of the petition for service on the debtor or, if there are more debtors than one, as many copies as there are debtors, and the chief ministerial officer of the Court shall sign the copy or copies if on examination he finds them to be correct

(2) The copy shall be served together with the notice of the order fixing the date for hearing the petition on the debtor or upon the person upon whom the Court orders notice to be served. Such notice may, in the discretion of the Court, require the debtor to file a schedule containing all the particulars mentioned in section 13 (d) and (e) within such time not being less than ten days from date of service of notice as the Court shall determine

VI—A debtor's petition shall be in Form No 2 & a creditor's petition shall be in Form No 3

VII—If a debtor against whom an insolvency petition has been admitted dies before the hearing of the petition, the Court may order that notice of the order fixing the date for hearing the petition shall be served on his legal representative or on such other person as the Court may think fit in a manner provided for the service of summons.

Proof of Debts.

VIII—(1) Unless otherwise ordered, all claims shall be proved by affidavit in Form No 7 in the manner provided in section 49 of the Act, provided that before admitting any claim the Court may call for further evidence

(2) The affidavit may be made by the creditor or by some person authorised by him, provided that if the deponent is not the creditor the affidavit shall state the deponent's authority and means of knowledge

(3) As soon as may be after proof of any debt is tendered, the Court shall by order in writing, admit the creditor's claim in whole or in part or reject it, provided that when a claim is rejected in whole or in part the order shall state briefly the reasons for the rejection

(4) A copy of every order rejecting a claim, or admitting it in part only, shall be sent by the Court by registered post to the person making the claim within seven days from the date of the order

IX—In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor, or by some other person on behalf of all such creditors. Such proof should be in Form No 8

Schedule of Creditors.

X—As soon as the schedule of creditors has been framed, a copy thereof shall, if a receiver has been appointed, be supplied to him, and all subsequent entries and alterations made therein shall be communicated to the receiver, except in cases where the Official Receiver himself frames such schedule under section 80

Scheme.

XI—(1) If a debtor submits a proposal under section 38 (1) of the Act, the Court shall fix a date for the consideration of the proposal, and notice thereof together with a copy of the terms of the proposal shall be sent to every creditor who has proved

(2) At the meeting for the consideration of the proposal the debtor shall be entitled to address the Court in person or by pleader in support of the proposal and every creditor who has proved shall be entitled in person or by pleader to question the debtor and to address the Court

Receivers.

XII—(1) Every receiver or *interim* receiver other than the Official Receiver shall be required to give such security as the Court thinks fit, provided that a Nazir or Deputy Nazir or other Government Officer who is appointed a receiver or *interim* receiver *ex-officio* and who has already under the Public Accountants' Default Act, XII of 1850, or otherwise, given security that is still valid for the due account of all monies which shall come into his possession or control by reason of his office, shall not be required to give such security unless owing to the extent of the assets likely to be realised or for other special reasons, the Court thinks it desirable to do so

(2) The Court shall not require an Official Receiver to give security in each case in which he acts under section 57 (2), but he shall, previous to his admission or within such further time as the Court may allow, give general security by entering into a recognizance with one or more sufficient sureties in Form No 16 or by depositing Government Securities in such time as the High Court may fix in this behalf

(3) Where a petition is referred to an Official Receiver for disposal in exercise of his powers under section 80, the Court ordinarily shall when the debtor is the petitioner, and may, when a creditor is the petitioner, at the same time appoint him an *interim* receiver under section 20 and confer on him all the powers conferable on a receiver under Order XL rule (1) (d), of the Civil Procedure Code. Such Official Receiver, upon making an order of adjudication, shall at once apply to the Court for an order appointing him Receiver for the party of the insolvent under sections 56 and 57. The Official R

should at the same time submit a draft order in Form No 6, with the necessary modifications, for signature and sealing

XIII—The Court may remove or discharge any receiver other than an Official Receiver, and any receiver or *interim* receiver so removed or discharged, or any Official Receiver suspended or dismissed by the Local Government, shall unless the Court otherwise orders deliver up any assets of the debtor in his hands and any books, accounts or other documents relating to the debtor's property which are in his possession or under his control to such person as the Court may direct.

(2) If an order of adjudication is annulled, the receiver (if any) shall unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any books, accounts or other documents relating to the debtor's property which are in his possession or under his control to the debtor or to such other person as the Court may direct

XIV—Every receiver or *interim* receiver shall be deemed for the purpose of the Act and of these rules to be an officer of the Court

XV—(1) Every application to the Court made by a receiver or an *interim* receiver shall be in writing

(2) The Court may order that notice of any application by the receiver and of the date fixed for the hearing of the application shall be sent by registered post to all creditors who have proved

XVI—(1) The remuneration of receivers other than Official Receivers shall be in such proportion to the amount of the dividends distributed as the Court may direct, provided that it does not exceed five per centum of the amount of the dividends

(2) When a Receiver realizes the security of a secured creditor, the Court may direct additional remuneration to be paid to him with reference to the amount of work which he has done and the benefit resulting to the creditors

(3) If a Receiver other than the Official Receiver has been appointed in an insolvency in which the Court makes an order approving a proposal under section 39 of the Act, the remuneration to be paid to the Receiver shall be fixed by the Court, and the order approving the proposal shall make provision for the payment of the remuneration and shall be subject to the payment thereof

XVII—The Receiver in making his report shall state whether in his opinion any of the facts mentioned in Section 42 Sub-clause (1) of the Act exist, and if the debtor makes a proposal under Section 39 (1) of the Act, the Receiver shall state in his report whether in his opinion the proposal is reasonable and is likely to benefit the general body of the creditors and shall state the reasons for his opinion

XVIII—If the Court directs, the debtor shall furnish the Receiver or if a Receiver has not been appointed, the Court, with a trading account and an account showing all moneys and securities paid, disposed of or encumbered, or recovered by or from the debtor or on his account and his income and the source thereof for such period as the Receiver

or, if a Receiver has not been appointed, the Court may direct: provided that the Receiver shall not, without the previous sanction of the Court direct the debtor to furnish accounts for more than two years before the date of the presentation of the insolvency petition

XIX—(1) That Receiver shall keep a cash book and such books and other papers as are necessary to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate

(2) Any creditor who has proved his debt, or the debtor, shall be entitled to obtain a copy of the Receiver's accounts (or any part thereof) relating to the estate on payment of the legal fees therefor

XX—The Receiver shall deposit all valuable securities for safe custody with the Nazir or, if so ordered by the Court in the Imperial Bank of India and whenever a sum exceeding Rs 500 shall stand to the credit of any one estate, the Receiver shall give notice thereof to the Court, and, unless it shall appear that a dividend is about to be immediately declared, he shall obtain the Court's order to invest the same in a Promissory Note of the Government of India or in Post Office Cash Certificates

Dividends.

XI—No dividend shall be distributed by a Receiver without the previous sanction of the Court

XXII—The amount of the dividend may, at the request and risk of the creditor, be transmitted to him by post

Discharge.

XXIII—(1) An application for discharge shall not ordinarily be heard until after the schedule of creditors has been framed and the Receiver has submitted his report. The Receiver if he is in a position to make it and has not already done so, shall file his report in Court not less than fourteen days before the date fixed for the hearing of the application

(2) Every creditor who has proved shall be entitled in person or by Pleader to appear at the hearing and oppose the discharge, provided that he has served upon the insolvent and upon the Receiver (if any) not less than 7 days before the date fixed for the hearing of a notice stating the ground of his opposition to the discharge

(3) A creditor who has not served the prescribed notices shall not, unless the Court otherwise directs, be permitted to oppose the discharge of the debtor, and a creditor who has served the prescribed

notices shall not be permitted, unless the Court otherwise directs to oppose the discharge on any ground not specified in the notice

(4) At the hearing of the application the Court may hear any evidence which may be tendered by a creditor who has served the prescribed notices, or by the Receiver, and also any evidence which may be tendered on behalf of the debtor and shall examine the debtor if necessary, for the purpose of explaining any evidence tendered and may hear the Receiver, the debtor, in person or by Pleader, and any creditor, in person or by Pleader, who has served the prescribed notices

(5) Any case in which the debtor fails to apply for his discharge within the period allowed by the Court under Section 27 shall be brought up for orders under Section 43. If the Court has omitted to specify a period under section 27 (1) and the debtor has not already applied for discharge, the Court upon receipt of the Receiver's report shall fix a period within which the debtor shall apply for an order of discharge. Notice of such period shall be given to the Receiver and the debtor, and if on its expiry, the debtor has not applied accordingly the case shall be brought up for orders under Section 43

Notices.

XXIV (1) The notices to be given under Sections 30 and 37 of the Act shall be published in the Bombay Government Gazette in English, and, if the Court so directs, in any suitable English or Vernacular newspaper and copies of the notices in English and in the language of the Court shall be affixed to the notice board of the Court

(2) The notice to be given under sections 19 (2), 38 (1) and 41 (1) of the Act shall be published in any suitable English or Vernacular newspaper, and if the Court so directs, in the Bombay Government Gazette and copies of the notices in English and in the language of the Court shall be affixed to the notice board of the Court

(3) Notice of the date fixed for the hearing of an insolvency petition under Section 19 (1) of the Act shall be sent by the Court by registered post, if the petition is by the debtor, to all creditors mentioned in the petition and if the petition is by a creditor, to the debtor no less than 14 days before the said date

(4) Notice of the date fixed for the consideration of a proposal under Section 38 (1) of the Act shall be sent by the Court by registered post to all creditors who have tendered proof of their debts not less than 14 days before the said date

(5) Notice of the date fixed for the hearing of an application for discharge under section 41 (1) of the Act shall be despatched by the Court by registered post to all persons, whose names have been entered in the Schedule of creditors not less than 14 days before the said date

(6) The notice to be given under Section 64 of the Act shall be sent by the Receiver by registered post to all persons whose claims

to be creditors have been notified but not proved not less than one calendar month before the limit of time fixed for proving claims

() The notice to be given under section 33 (3) of the Act shall be served only on the debtor and on the creditors whose names appear in the Schedule of creditors and may if the Court so directs be served on any or all such creditors by registered post

(8) The Court may instead of or in addition to forwarding a notice by registered post under the foregoing rules cause it to be served in the manner prescribed for the service of summons

(9) In addition to the prescribed methods of publication any notice may be published otherwise in such manner as the Court may direct for instance by affixing copies in the Court house or by beat of drum in the village in which the debtor resides

(10) It shall not be necessary to give notice of the date to which the hearing of a petition or of an application for discharge or the consideration of a proposal is adjourned

Summary Administration

XXV—When an estate is ordered to be administered in a summary manner under section 4 of the Act the provisions of the Act and rules shall subject to any special direction of the Court and in addition to the modifications contained in Section 4 be modified as follows namely

- () There shall be no advertisement of an proceedings in a local paper
- () The petition and all subsequent proceedings shall be endorsed Summary Case
- () The notice of the hearing of the petition to the creditors shall be in Form No 15
- (v) The Court shall examine the debtor as to his affairs but shall not be bound to call a meeting of creditors but the creditors shall be entitled to be heard and to cross examine the debtor
- (v) The appointment of a Receiver will generally not be necessary and the Court may act under Section 58 of the Act in order to reduce the costs of the proceedings

Sale of immoveable property of debtor

XXVI If no Receiver is appointed and the Court in exercise of its powers under section 58 of the Act sells any immoveable property of the debtor the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall (subject to any modifications the Court thinks necessary) be signed by the Presiding Officer of the Court

Costs

XXVII—(1) All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party

prosecuting them, but when an order of adjudication has been made the costs of the petitioning creditors shall be taxed and be payable out of the estate

(2) Before making an order in an insolvency petition presented by a debtor, the Court may require the debtor to deposit in Court a sum sufficient to cover the costs of sending the prescribed notices of the hearing of petition

(3) No costs incurred by a debtor of, or incidental to, an application to approve a composition or scheme shall be allowed out of the estate if the Court refuses to approve the composition or scheme

(4) Whenever a creditor presents an insolvency petition he shall deposit in Court the sum of Rs 150 to cover expenses. Such deposit shall be paid out of the first available assets realised

Procedure where the debtor is a Firm.

XXVIII —(1) Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall also add his own signature, e.g., "Brown & Co, by James Green, a partner in the said firm"

(2) Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there

(3) The provisions of the last preceding rule shall, so far as the nature of the case will admit, apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own

(4) Where a firm of debtors file an insolvency petition the same shall contain the names in full of the individual partners and if such petition is signed in the firm name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same

(5) An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm

(6) In cases of partnership the debtors shall submit a schedule of their partnership affairs, and each debtor shall submit a schedule of his separate affairs

(7) The joint creditors, and each set of separate creditors may severally accept compositions or schemes of arrangement. So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner, notwithstanding that the proposal

or proposals of some or one of the debtors made to their or his separate creditors may not be accepted.

(8) Where proposals for compositions or schemes are made by a firm, and by the partners therein individually, the proposals made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors, and the proposal made to each set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposal may vary in character and amount. Where a composition or scheme is approved, the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

(8) If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last-mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And when any surplus shall arise upon the administration of the assets of such separate estates of the partners in such separate and independent firm according to their respective rights therein.

Inspection of Proceedings.

XXIX—All insolvency proceedings may be inspected at such times and subject to such restrictions as the Court may prescribe by the Receiver, the debtor, any creditor who has proved or any legal representative on their behalf.

Pleader's Fees.

XXX—The fees allowed to Pleaders as costs in any proceedings under the Act shall be such as are allowed under the rules of the Court for a miscellaneous proceeding.

APPENDIX

FORM No 1

General Title.

In the Court of
Insolvency Petition No. _____ of 19____

In the matter of

Ex parte (here insert 'the debtor' or "A B a creditor" or "the Official Receiver" or "the Receiver")

FORM No 2

Debtor's Petition.

(Title)

I (a) ordinarily residing at, (or "carrying on business at" or "personally working for gain at" or "in custody at") in consequence of the

(a) Insert name and address and description of debtors

(b) State name of Court and particulars of decree in respect of which an order of detention has been made or by which an order of attachment has been made against debtor's property

(c) State whether and how any of the debts are secured

order of (b) being unable to pay my debts, hereby petition that I may be adjudged insolvent. The total amount of pecuniary claims against me is Rs (c) as set out in detail in Schedule A annexed herewith, which contains the names and residences of all my creditors, so far as they are known to me or can be ascertained by me. The amount and particulars of all my property and debts due to me are set out in Schedule B annexed hereunto together with a specification of all my property not consisting of money, and the place or places at which such property is

be found, and I hereby declare that I am willing to place all such property at the disposal of the Court save in so far as it includes such particulars (not being my books of accounts) as are exempted by law from attachment and sale in execution of a decree

(a) I filed a petition to be adjudged an insolvent in the Court of on or about

(d) Strike out the whole of this clause if the debtor has not filed a previous petition to be adjudged an insolvent and substitute a statement to that effect

and on such petition was adjudged an insolvent in respect of debts totalling approximately Rs against which assets were realized to the extent of approximately Rs and a dividend ("dividends") of

in the rupee was (or "were") declared. I was granted an absolute order of discharge or "I was refused an absolute order of discharge and my discharge was suspended for "and or" I was granted an order of discharge subject to the following conditions") on or about

This adjudication has been annulled on the following grounds (or "has not been annulled") (or for the above reasons) and on such petition" substitute)

"and such petition was dismissed for the following reasons —

(Signature)

(Verification clause as in plaints)

Schedule A referred to in Form No. 2.

Form of list of creditors to be annexed to the debtor's petition

CREDITORS

No	Names and residences of creditors and claimants	Nature and consideration of debt or claim (if any) also if the debt is disputed the reason	When contracted	Amount of claim	Payments	Interest due at date of presenting petition or filing Schedule with rate	Balance due	Admitted or disputed

N B—Where there have been mutual dealings and it is alleged that a claim by any party has been set off, such party must be entered both as a creditor and debtor and the word "Set off" must be written under the amount

FORM No 2

Debtor's Petition.

(Title)

- I (a) ordinarily residing at, (or "carrying on business at" or "personally working for gain at or in custody at _____") in consequence of the order of (b) being unable to pay my debts hereby petition that I may be adjudged insolvent. The total amount of pecuniary claims against me is Rs _____ (c) as set out in detail in Schedule A annexed herewith which contains the names and residences of all my creditors, so far as they are known to or can be ascertained by me. The amount and particulars of all my property and debts due to me are set out in Schedule B annexed herewith together with a specification of my property not consisting of money, and the place or places at which such property is to be found, and I hereby declare that I am willing to place all such property at the disposal of the Court save in so far as it includes such part of my property (not being my books of accounts) as are exempted by law from attachment and sale in execution of a decree.
- (a) I filed a petition to be adjudged an insolvent in the Court of _____ on or about _____ and on such petition was adjudged insolvent in respect of debts totalling approximately Rs _____ against which assets were realized to the extent of approximately Rs _____ and a dividend of _____ ("dividends") of _____ in the rupee was (or 'were') declared. I was granted an absolute order of discharge or "I was refused an absolute order of discharge and my discharge was suspended for _____" and or 'I was granted an order of discharge subject to the following conditions: _____') on or about _____.
- This adjudication has been annulled on the following grounds (or 'has not been annulled') _____ (or for the above reasons) "and on such petition" substitute) _____ "and such petition was dismissed for the following reasons —

(Signature)

(Verification clause as in plaints)

Schedule A referred to in Form No. 2.

Form of list of creditors to be annexed to the debtor's petition

CREDITORS

No	Names and residences of creditors and claimants	Nature and consideration of debt or claim (if any) also if the debt is disputed, the reason	When contracted	Amount of claim	Payments	Interest due at date of presenting petition or being Schedule with rate	Balance due	Admitted or disputed
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N B—Where there have been mutual dealings and it is alleged that a claim by any party has been set off, such party must be entered both as a creditor and debtor and the word "Set-off" must be written under the amount

Schedule B referred to in Form No. 2.

Form of list of debtors to be annexed to the debtor's petition

DEBTORS.

No	Name and residence of debtors	Nature and consideration of the debt and the securities (if any) for the same	When contracted	Amount	Good bad or doubtful	Witnesses with their residences and other evidence by which the debt may be proved

* If—Where there have been mutual dealings and it is alleged that a claim by any party has been set-off such party must be entered both as a creditor and debtor and the word "Set-off" must be written under the amount.

FORM No. 3

Creditor's Petition.

(Title)

I, C D, of (or We, C D, of
& E F, of) hereby petition the Court that A B (a)
ordinarily residing at
(or carrying on business at
(a) Insert name, ad or 'personally working for gain at
dress and description may be adjudged an insolvent and say —

1 That the said A B is justly and truly indebted to me (or us in the aggregate) in the sum of Rs (set out amount of debt or debts, and the consideration)

(2) That I (or we) do not, nor does any person on my (or our) behalf hold any security on the said debtor's estate or any part thereof, for the payment of the said sum.

 O_r

That I hold security for the payment of (or part of) the said sums (but that I will give up such security for the benefit of the creditor of the said A B in the event of his being adjudged insolvent) (or, and I estimate the value of such security at the sum of Rs)

 O_r

That I, C D one of your petitioners, hold security for the pay
ment of, etc

That I, E F, another of your petitioners, hold security for the payment of, etc

3 That the said A B within 3 months before the date of the presentation of this petition has committed the following act (or acts of insolvency, namely, (here set out the nature and date or dates of the act or acts of insolvency relied on)

(Signature)

(Verification clause as in plants)

FORM No 4

Notice to creditors of the date of hearing of an insolvency petition—section 19.

(Title)

See Cal C P No 138 at p 501

FORM No 5

Order of Adjudication—section 27.

(Title)

See Cal C P No 133 at p 502

FORM No 6

Order appointing a Receiver—section 56.

(Title)

See Cal C P No 143 at p 507

FORM No 7

Proof of debts.**General Form—Section 49.**

(Title)

See Cal C P No 146 at p 505

FORM No 8

Proof of debts of workmen.

(Title)

See Cal C P No 147 at p 506

FORM No 9

Notice to creditors of the date of consideration of a composition or scheme of arrangement—section 38.

(Title)

See Cal C P No 142 at p. 503.

FORM No 10

Form under section 38 (2).

See Cal C P No 143 at p 504

FORM No 11

Form of Notice under section 64 . Notice to persons claiming to be creditors of intention to declare final Dividend.

(Title)

See Cal C P No 149 at p 507

FORM No 12

Order annulling Adjudication under section 37

(Title)

On the application of R S of _____ and on reading
and having _____ it is ordered that the order of adjudication
dated _____ against A B of _____ be
and the same is hereby annulled

Dated this _____ day of _____ 19 _____

Judge

FORM No 13

**Notice to creditors of Application for Discharge—
section 41 (1).**

(Title)

Same as Cal C P No 144 at p 504

FORM No 14

**Order of Discharge subject to conditions as to earnings,
after-acquired property and income.***Section 41 (2) (a), (b) or (3).*

. (Title)

Same as Cal C P. No 145 at p. 505

FORM No 15

Summary Administration—section 74.

(Title).

Notice to Creditors

Same as Cal C. P. No. 150 at p. 508

FORM No 16

Recognizance of the Official Receiver and sureties.**(Rule XIV).**

The Judge of the District Court has approved of
and allowed this recognizance

R P H of, etc, W B of, etc, and T. P. of etc.; in the District Court of _____ personally appearing, do acknowledge themselves, and every one of them doth acknowledge himself to owe the respective sums of money set opposite to their respective names in the schedule hereto be paid to _____ Esquire, Judge of the said District Court of _____ his successors in office or assigns; and in default of payment of the said respective sums, the said R P H, W B, and T P are willing and do agree each for himself, his heirs, executors and administrators, by these presents, that the said sums shall be levied, recovered and received of and from them, and every one

of them, and of and from them, and every one of them, and of and from all and singular the manors, messuage, lands, tenements and hereditaments, goods and chattels of them and every one of them wheresoever the same shall be found Witness the day of

19 Whereas the Government of Bombay have by an order No dated the day of 19 , appointed the said R H H Official Receiver under Section 57 of the Provincial Insolvency Act (V of 1920) and he has thereby become liable to give security to be approved of the said District Court And whereas the said Judge has approved of the said W B and T P to be sureties for the said R P H, in the amounts set opposite to their respective names in the schedule hereto and has also approved of the above written recognizance, with the underwritten condition as a proper security to be entered into by the said R P H, and T P, and in testimony of such approbation Esquire, the judge of the said Court, hath signed his name in the margin hereof Now the condition of the abovescribed recognizance is such that if the said R P H, his executors or administrators or any of them do and shall duly account for what the said R P H shall receive or get under his control, or become liable to pay, as Official Receiver at such periods and in such manner as the said Courts shall appoint and pay the same as the said Court direct, then the above recognizance to be void, otherwise to remain in full force and virtue

The schedule above referred to.

R P H	thousand rupees
W B	thousand rupees
T P	thousand rupees

Taken and acknowledged by the abovenamed R P H, etc, etc

Form No. 17.

Register of Insolvency Petitions

1	2	3	4	5	6	7	8
No. & date of petition	Names of (a) petitioners and (b) opponents	Nature of petition etc	(a) Total amount of alleged debts (b) Total amount of proved debts	(a) Total amount of alleged assets (b) Description & total amount of assets realized	Names or designation of Receiver, fees paid to him & dates of payment	Brief notes of interim orders passed by the Court & dates thereof, e.g., re dismissal of petition, adjudication, appointment of Receiver annulment of framing Schedule of creditors scheme or composition declaration of dividends, etc	Summary of final order and date thereof, e.g., re discharge, annulment enforcement of penal provisions etc

Bombay, 31st October, 1924

Sd/- N D GHARDA, Registrar

(Published in Bombay Government Gazette 1st 1924 Part I pages 2008 to 2713)

APPENDIX E. LOWER BURMA FORMS

(FORM NO 1)

Debtor's Petition.

[Section 13 (I), Provincial Insolvency Act 1920]

In the District Court of

MISCELLANEOUS No OF 1920

I, (a) ordinarily residing at, (or 'carrying on business at,' or "personally working for gain at, or in custody at ') being unable to pay my debts, hereby petition that I may be adjudged an insolvent in consequence of the order of (b) The total amount of all pecuniary claims against me is Rs (c) as set out in detail in Schedule A annexed hereunto, which contains the names and residences of all my creditors so far as they are known to, or can be ascertained by, me. The amount and particulars of all my property are set out in Schedule B annexed hereunto, together with a specification of all my property not consisting of money, and the place or places at which such property is to be found, and I hereby declare that I am willing to place all such property at the disposal of the Court save in so far as it includes such particulars (not being my books of account) as are exempted by law from attachment and sale in execution of a decree.

(a) Insert name and address and description of debtor
(b) State name of Court and particulars of decree in respect of which the order of detention has been made or by which an order of attachment has been made against debtor's property
(c) State whether and how any of the debts are secured

Signature

Verification clause as in plaints

SCHEDULE A—(DEBTS)

Name of Creditor	Residence of creditor	Amount of debt	Nature of debt	Security	
				Nature	Amount
(1)	(2)	(3)	(4)	(5)	(6)
		Rs a p			Rs a p

Column 4—In this column enter whether the debt is a judgment debt, amount due on promissory note, mortgage debt, verbal loan,

balance for goods, security for another, etc. In the case of judgment debt state the name of the Court and the number of the case.

Column 5—In this column state the nature of property, whether land, house, gold, etc., and the nature of the security, whether deposit, pledge without possession, pledge with possession, mortgage, deposit of title-deeds, etc.

SCHEDULE B—(ASSETS)

(1) *Moveable and Immoveable Property*

Description of property	Place where situated	In whose possession	In the case of Land		Value of property	If Mortgaged, state		Remarks
			Name of person and holding No	Area		Name and residence of mortgagee	Amount of mortgage	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
					Rs a p		Rs a p	

Column 9—In the remarks column state if petitioner is only part owner of the property, and, if so, who the other owners are, and what his share in the property is

(2) *Debts owing to Petitioner.*

Name of Debtor	Residence of Debtor	Nature of Debt	Amount of Debt	When contracted	Good or doubtful	Security		Remarks
						Nature	Amount.	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
			Rs a p				Rs a p	

Column 3—In this column enter particulars as in column 4 of Schedule A

FORM No 2

No in Bailiff's Register_____

**Notice to creditors of the date of hearing of an
insolvency petition.***(Section 19 Provincial Insolvency Act)*

In the District Court of

MISCELLANEOUS No OF 192

In the matter of

To

(a)

(a) Here
insert name,
description
and address

WHEREAS

has applied to this Court by a petition dated 192 , to
be declared an insolvent under the Provincial Insolvency
Act (V of 1920), and your name appears in the list of
creditors filed by the aforesaid debtor, this is to give you
notice that the Court has fixed the day of 192 for
the hearing of the aforesaid petition and the examination of
the debtor. If you desire to be represented in the matter,
you should attend in person or by duly instructed pleader.

The particulars of the debt alleged in the petition to be
due to you are as detailed below.

Given under my hand and the seal of the Court this
 day of 192

Judge

PARTICULARS OF DEBT

FORM No 3

**Bond under section 21 (1) of the Provincial
Insolvency Act, 1920.**

In the District Court of

CIVIL No OF 193

KNOW ALL MEN by these presents that we
son(s) of residing and son(s) of residing at are

jointly and severally bound unto Judge of the District Court of _____ in Rs _____ to be paid to the said or to his successor in office or to the assigns of the judge of the said District Court for the time being for which payment to be made, we bind ourselves and each of us in the whole our and each of our heirs, executors and administrators jointly and severally by these presents

(a) Here enter name description and address of debtor
Sureties to sign on the right side of line

Witnesses to sign on the left side and to give their descriptions and addresses

WHEREAS (a) _____ has been ordered under section 21 (1) of the Provincial Insolvency Act, 1920, to give reasonable security for his appearance until final orders are made upon the insolvent petition filed by _____ him _____ and whereas and _____ his creditors _____

_____ have consented to be sureties for the said _____ Now the condition of the above obligation is such that if the said _____ shall appear before the Court whenever called upon by it to do so Then this obligation shall be void and of no effect, otherwise, the same shall remain in full force and effect

IN WITNESS whereof we have hereunto set our hands this day of _____ 192

Signed by _____

in the presence of _____

FORM No 4

Warrant of committal of Debtor in insolvency proceedings.

[Section 21 (1) Provincial Insolvency Act]

In the District Court of

CIVIL MISCELLANEOUS NO _____ OF 192

Applicant

v

Respondent

To

THE SUPERINTENDENT OF THE JAIL AT

WHEREAS _____, son of _____ residing at _____ has been ordered to give security for his appearance until final orders

are passed on the insolvency petition filed by him
and has failed to do so his creditors

These are to direct you to detain the said
in custody until the further orders of this Court

Given under my hand and the seal of the Court this
day of 192

Judge

(FORM No 5)

Order of Adjudication.

(Section 27 Provincial Insolvency Act)

In the District Court of

MISCELLANEOUS NO OF 192

In the matter of

Pursuant to a petition, dated the against (a) Here
(a) and on the application of (b) and on reading insert name,
and hearing it is ordered that the debtor be description
and the said debtor is hereby adjudged insolvent and address
of debtor

The Court will proceed to frame a schedule of creditors (b) Here
and debt by the 192 and proof of debts which it insert "the
is desired to have included in the schedule should reach Official
the Court seven days at least before that date, provided that Receiver"
application for entry of a debt in the schedule may be made or "the
at any time before the discharge of the insolvent A debt debtor him-
may be proved by delivering or sending by post in a regi- self" or
"A. B
a creditor "
tered letter to the Court an affidavit verifying the debt
The affidavit must contain or refer to a statement of account
showing the particulars of the debt and must specify the
vouchers (if any) by which the debt can be substantiated

Given under my hand and the seal of the Court this
day of 192

Judge

FORM No 6

No in Bailiff's Register

Notice of application by unscheduled creditor.[Section 33 (3), *Provincial Insolvency Act*]

In the District Court of

MISCELLANEOUS NO OF 192

IN the matter of

an Insolvent

To

(a) Here
enter name
description
and
address

WHEREAS (a)

who claims to be a creditor of (a)
for whose adjudication as an insolvent a petition was filed
in this Court on the day of 192 , has tendered
proof of the debt due to him by the said , and has
applied to this Court for an order directing his name to
be inserted in the schedule as a creditor for such debts.
This is to give you notice that the said application will be
heard in this Court on the day of 192 , when
you should appear personally, or by Pleader, if you desire
to object to it.

Given under my hand and the seal of the Court this
day of 192

Judge

FORM No 7

Order annulling adjudication.[Section 35, *Provincial Insolvency Act*]

In the District Court of

MISCELLANEOUS NO OF 192

IN the matter of

(a) Here
enter name,
description
and address

On the application of (a)
on reading and hearing , it is ordered that
the order of adjudication dated , against of ,
be and the same is hereby annulled.

Given under my hand and the seal of the Court this
day of 192

Judge

FORM No 8

Notice to Creditors of the date of consideration of a composition or scheme of arrangement.

Section 38

In the District Court of

MISCELLANEOUS NO OF 192

TAKE notice that the Court has fixed the day of 192 for the consideration of a composition (or scheme of arrangement) submitted by A B the debtor in the above insolvency petition No creditor who has not proved his debt before the aforesaid date will be permitted to vote on the consideration of the above matter If you desire to be represented at the above mentioned hearing, you should be present in person or by duly instructed pleader with your proofs

Judge

FORM No 9

List of Creditors for use at meeting held for consideration of composition or scheme.

Section 38 (2)

In the District Court of

MISCELLANEOUS NO OF 192

Meeting held at this day of 192

No	Names of all creditors whose proofs have been admitted	Here state as to each creditor whether he voted and if so whether personally or by pleader	Amount of assets			Amount of admitted proof		
			Rs	A	P	Rs	A	P
		Total						

Required number of Majority

Required value Rs

FORM No 10

Notice to Creditors of application for discharge.

[Section 41 (1), Provincial Insolvency Act]

In the District Court of

MISCELLANEOUS NO

OF 192

(a) Here
enter name,
description
and address

In the matter of(a)

Take notice that the abovenamed insolvent has applied to the Court for his discharge, and that the Court has fixed the day of 192 at o'clock for hearing the application.

Given under my hand and the seal of the Court this day of 192 .

Judge

Note—The provisions of section 42 (1), Act V of 1920 are on the reverse

FORM No 11

Order of discharge subject to conditions as to earnings, after-acquired property and income.

[Section (41) (c), Provincial Insolvency Act]

In the District Court of

MISCELLANEOUS NO

OF 192

In the matter of

On the application of(1)

(1) Here
enter name,
description
and address(2) (a) he
discharged
forthwithor
(b) he dis
charged on,
the or

adjudged insolvent on the day of 192 .
and upon taking into consideration the report of the Official Receiver (or Receiver) as to the insolvent's conduct and affairs and hearing

and

creditors

It is ordered that the insolvent(2)

After setting aside out of the insolvent's earnings, after-acquired property, and income, the yearly sum of Rs

for the support of himself and his family, the insolvent shall pay the surplus (3) if any, of such earnings, after acquired property, and income to the Court or Official Receiver (or Receiver) for distribution among the creditors in the insolvency. An account shall, on the first day of January in every year, or within fourteen days thereafter, be filed in these proceedings by the insolvent, setting forth a statement of his receipts from earnings after acquired property, and income during the year immediately preceding the said date, and the surplus payable under this order shall be paid by the insolvent into Court or to the Official Receiver (or Receiver) within fourteen days of the filing of the said account.

Given under my hand and the seal of the Court this day of 192

Judge

FORM No 12

Proof of Debt.

General Form — Section 49

In the District Court of

MISCELLANEOUS NO OF 192

In the matter of No (a)
of 192 (a) Here
I, of (b) make oath and say (or solemnly insert
and sincerely affirm and declare) — number
I That the said ^{was} ~~were~~, at the date of the petition viz given in the
the day of 192 and still ^{is} ~~are~~, justly and truly in notice
debted to me in the sum of Rs a p for (c) (b) Address
as shown by the account endorsed hereon (or the in full
following account viz) for which sum or any part (c) State
thereof I say that I have not nor hath any person by my consideration and
order to my knowledge or belief for my use had or received specify the
any manner of satisfaction or security whatsoever save and vouchers
except the following (d) if any in
(d) Here support of
details of the claim
security bills or the
like

Deponent's Signature

Sworn at this day of before me

Commissioner

Admitted to vote for Rs

Judge or Official Receiver

FORM No 13

Proof of Debt of Workmen.

In the District Court of

MISCELLANEOUS NO OF 192

(a) Full name of deponent
 (b) Fill in address of deponent, stating whether he is the debtor or the foreman etc of the debtor or other person on behalf of the workmen and others employed by the debtor
 (c) I or the said
 (d) My employ or the employ of the abovenamed debtor
 (e) Me or the above named debtor

I, (a) of (b) make oath and say (or solemnly and sincerely affirm and declare) —
 I That (c) was at the date of the adjudication viz, the day of 192, and still $\frac{am}{is}$ justly and truly indebted to the several persons whose names, addresses and descriptions appear in the schedule endorsed hereto in sums severally set out against their names in the sixth column of such schedule for wages due to them respectively as workmen or others in (d) in respect of services rendered by them respectively to (e) during such periods before the date of the receiving order as are set out against their respective names in the fifth column of such schedule, for which said sums, or any part thereof, I say that they have not nor hath any of them had or received any manner of satisfaction or security whatsoever

Deponent's Signature

Sworn at this day of before me
Commissioner

Admitted to vote for Rs

Judge or Official Receiver

FORM No 14

Order Appointing Receiver.*(Section 56, Provincial Insolvency Act)*

In the District Court of

MISCELLANEOUS NO OF 192

(a) Here enter name description and address of the insolvent

In the matter of
 WHEREAS (a) was adjudicated an insolvent by order of this Court dated 192, and it appears to the Court that the appointment of a Receiver for the property of the insolvent is necessary

It is ordered that a receiving order be made against the insolvent and a receiving order is hereby made against the insolvent and

of
 (or the Official Receiver) is hereby constituted Receiver of the property of the said insolvent And it is further ordered

that the said Receiver (not being the Official Receiver)
do give security to the extent of _____ and that his
remuneration be fixed at _____

Given under my hand and the seal of the Court this
day of _____ 192

Judge

FORM No 15

Notice to Persons claiming to be Creditors of intention to declare final dividend.

(Section 64)

In the District Court of

MISCELLANEOUS NO _____ OF 192

Take notice that a final dividend is intended to be
declared in the above matter, and that if you do not establish
your claim to the satisfaction of the Court on or before the
day of _____ 192 or such later day
as the Court may fix, your claim will be expunged and
I shall proceed to make a final dividend without regard
to such claim

Dated this day of _____ 192 *Receiver*

FORM No 16

Warrant of committal of Debtor in insolvency proceedings

(Section 69 Provincial Insolvency Act)

In the District Court of

MISCELLANEOUS NO _____ OF 192

To

THE SUPERINTENDENT OF THE JAIL AT

WHEREAS a petition has been presented to this Court
that (1) _____ may be adjudged an insolvent

AND WHEREAS the said _____ has been found upon (1) Here enter name

FORM No 13

Proof of Debt of Workmen.

In the District Court of

MISCELLANEOUS NO

OF 192

(a) Full name of deponent
(b) Fill in address of deponent stating whether he is the debtor or the foreman etc of the debtor or other person on behalf of the workmen and others employed by the debtor
(c) I or the said
(d) My employ or the employ of the abovenamed debtor
(e) Me or the above named debtor

I, (a) of (b) make oath and say (or solemnly and sincerely affirm and declare) —
I That (c) was at the date of the adjudication, viz, the day of 192, and still $\frac{\text{am}}{\text{is}}$ justly and truly indebted to the several persons whose names, addresses and descriptions appear in the schedule endorsed hereon in sums severally set out against their names in the sixth column of such schedule for wages due to them respectively as workmen or others in (d) in respect of services rendered by them respectively to (e) during such periods before the date of the receiving order as are set out against their respective names in the fifth column of such schedule, for which said sums, or any part thereof, I say that they have not nor hath any of them had or received any manner of satisfaction or security whatsoever

Deponent's Signature

Sworn at this day of before me.
Commissioner

Admitted to vote for Rs

Judge or Official Receiver

FORM No 14

Order Appointing Receiver.*(Section 56 Provincial Insolvency Act)*

In the District Court of

MISCELLANEOUS NO

OF 192

(a) Here enter name description and address of the insolvent

In the matter of
WHEREAS (a) was adjudicated an insolvent by order of this Court, do ed 192, and it appears to the Court that the appointment of a Receiver for the property of the insolvent is necessary

It is ordered that a receiving order be made against the insolvent and a receiving order is hereby made against the insolvent and

of

(or the Official Receiver) is hereby constituted Receiver of the property of the said insolvent And it is further ordered

that the said Receiver (not being the Official Receiver)
do give security to the extent of _____ and that his
remuneration be fixed at _____

Given under my hand and the seal of the Court this
day of _____ 192

Judge

FORM No 15

**Notice to Persons claiming to be Creditors of
intention to declare final dividend.**

(Section 64)

In the District Court of

MISCELLANEOUS NO _____ OF 192

Take notice that a final dividend is intended to be
declared in the above matter, and that if you do not establish
your claim to the satisfaction of the Court on or before the
day of _____ 192, or such later day
as the Court may fix, your claim will be expunged and
I shall proceed to make a final dividend without regard
to such claim

Dated this day of _____ 192 Receiver

FORM No 16

**Warrant of committal of Debtor in insolvency
proceedings**

(Section 69 Provincial Insolvency Act)

In the District Court of

MISCELLANEOUS NO ' _____ OF 192

To

THE SUPERINTENDENT OF THE JAIL AT

WHEREAS a petition has been presented to this Court
that (1) _____ may be adjudged an insolvent

AND WHEREAS the said _____ has been found upon (1) Here
enter name

description
and address
(2) Here
enter the
substance of
(a) (b) or c),
as the case
may be of
section 69

inquiry duly made to have (2)
and has been sentenced by the Court to simple imprison-
ment for the term of

YOU ARE HEREBY directed to receive the said
into your custody, together with this warrant, and carry the
aforesaid sentence into execution according to law

Given under my hand and the seal of the Court this
day of 192

Judge

FORM No 17

Summary Administration.

(Section 74, Provincial Insolvency Act)

In the District Court of

MISCELLANEOUS NO OF 192

(a) Here
enter name,
description
and address
of debtor

In the matter of (a)

Take notice that on the day of 192
the abovenamed debtor presented a petition to this Court
praying to be adjudicated an insolvent, and that on the
day of 192, the Court being satisfied
that the property of the debtor is not likely to exceed
Rs 500, directed that the debtor's estate be administered
in a summary manner and appointed the day of
192, for the further hearing of the said petition
and the examination of the said debtor

Also take notice that the Court may on the aforesaid date
then and there proceed to adjudication and distribution of
the assets of the aforesaid debtor. It will be open to you
to appear and give evidence on that date. Proof of any
claim you desire to make must be lodged in Court on or
before that date

Given under my hand and the seal of the Court this
day of 192

Judge

APPENDIX F.

ADDITIONAL MODEL FORMS AND PLEADINGS.

MODEL FORM No 1

Debtor's Petition.

Cause-title as at p 500 or as at p 523

The humble petition of XY of

Most Respectfully sheweth

1 That your petitioner ordinarily resides at and was hitherto carrying on business at and , both the places being within the jurisdiction of this Court

2 That your petitioner has suffered considerable loss in his said business owing to (mention circumstances) and that as a result thereof your petitioner has become heavily involved in debts

3 That your petitioner has now no income from his said business and has no other source of income save and except the said business (or he is out of employment etc) and that your petitioner is therefore unable to pay his debts

4 That the total amount of all pecuniary claims against your petitioner is Rs (exceeding five hundred) or that your petitioner is under arrest (or in prison) in connection with the Execution Case No of in the Court of at in the district of in execution of a money decree obtained against your petitioner by (so & so) in the Court of in the district of or that an order of attachment has been made by (mention the Court) in execution of and that the said order of attachment is still subsisting against your petitioner's property

5 That the particulars of your petitioner's debts together with the names and residences of all his creditors so far as they are known to or could be ascertained by your petitioner have been set out in details in schedule A hereunto annexed

6 That the amount and particulars of your petitioner's property together with a specification of their value and of the places at which they can be found have been set out in schedule B annexed hereunto

7 That your petitioner is willing to place all such properties at the disposal of the Court save and except those not liable to attachment under the Code of Civil Procedure or any other law

8 That your petitioner has not on any previous occasion filed a petition to be adjudged an insolvent or that your petitioner filed such a petition in the Court of _____ on _____ but the same was dismissed (state the reasons) or that your petitioner was adjudged an insolvent (state in concise particulars) but the order of adjudication was subsequently annulled for (state reasons)

• Under the aforesaid circumstances your petitioner humbly prays that your Honour be pleased to adjudge your petitioner an insolvent and to make such orders as your Honour may deem fit and proper

And your petitioner etc

[Verification]

MODEL FORM No 2

Creditor's Petition.

(Cause title as before)

The humble petition of A B of _____

Most Respectfully sheweth

1 That your petitioner ordinarily resides or carries on business or personally works for gain at _____

2 That your petitioner had business transaction with A B of _____ within the jurisdiction of this Court (or with A B who carries on business or personally works for gain at _____ within the jurisdiction of this Court) in course of which your petitioner gave the said A B _____ hundred bales of jute at the rate of Rs _____ per bale on credit on _____ months sight which expired on (date) last

3 That your petitioner is therefore entitled to get the liquidated sum of Rs _____ from the said A B of which the latter has not as yet paid anything

4 That the said A B with intent to defeat and delay his creditors left his usual place of business on (date) and since then has been keeping himself concealed depriving his creditors of all means of communication with him (mention other acts of insolvency under sec. 6, if any committed within the last three months)

In these circumstances your petitioner prays that your Honour be pleased (a) to appoint an *interim* receiver in respect of the estate of the said A B or (b) to make an order directing attachment by actual seizure of the entire property of the said A B.

and (c) to order a warrant to issue for the arrest of the said A B and (d) to adjudge the said A B an insolvent and to pass such other orders as your Honour may think fit

And your petitioner etc

(Verification)

MODEL FORM No 3

Insolvency application where the Debtor is a Firm.

(Vide Calcutta Rules Nos 19-27, Madras Rules Cl XXVIII, Allahabad Rules Nos 22-30, Bombay Rules Cl XXVIII)

In the Court of the District Judge of Backargunj

INSOLVENCY CASE NO OF 1927

In the matter of A B an insolvent

The humble petition of Brown & Co a firm carrying on business as dealers in rice at in co partnership with A B and C D (the names and addresses in full of the individual partners) as partners under the name and style Brown & Co

Most respectfully sheweth

1 That your petitioners are carrying on business as dealers in rice as aforesaid at within the jurisdiction of this Court and that owing to (state the circumstances) have incurred pecuniary liabilities to the extent of Rs 10 000 which your petitioners assets are insufficient to liquidate and which your petitioners are unable to pay

2 That the particulars of all pecuniary claims against your petitioners together with the names and residences of your petitioners' creditors so far as they are known to or can by the exercise of reasonable care and diligence be ascertained by your petitioners are set forth in schedule A annexed hereunto

3 That an order has been made in Execution Case No of—for attachment of your petitioners properties by the Subordinate Judge's Court of Barisal in execution of the decree dated the made by the said Subordinate Judge's Court in Money suit No of 19 in favour of one (so and so) against your petitioners' firm for recovery of Rs

(This paragraph will be necessary only if there is any attachment)

4 That your petitioners beg leave to set forth a true and correct statement of the partnership properties and affairs of Brown & Co together with a specification of their values and the places where they are situate in schedule B hereunto annexed as also a similar statement with like specification of the separate properties and affairs of the

8 That your petitioner has not on any previous occasion filed a petition to be adjudged an insolvent or that your petitioner filed such a petition in the Court of on but the same was dismissed (state the reasons) or that your petitioner was adjudged an insolvent (state concise particulars) but the order of adjudication was subsequently annulled for (state reasons)

Under the aforesaid circumstances your petitioner humbly prays that your Honour be pleased to adjudge your petitioner an insolvent and to make such orders as your Honour may deem fit and proper

And your petitioner etc

[Verification]

MODEL FORM No 2

Creditor's Petition.

(Cause title as before)

The humble petition of A, Y & Co

Most Respectfully sheweth

1 That your petitioner ordinarily resides or carries on business or personally works for gain at

2 That your petitioner had business transaction with A B of within the jurisdiction of this Court (or with A B who carries on business or personally works for gain at within the jurisdiction of the Court) in course of which your petitioner gave the said A B one hundred bales of jute at the rate of Rs per bale on credit on 12 months sight, which expired on (date) last

3 That your petitioner is therefore entitled to get the liquidated sum of Rs from the said A B of which the latter has not as yet paid anything

4 That the said A B with intent to defeat and delay his creditors left his usual place of business on (date) and since then has been keeping himself concealed depriving his creditors of all means of communication with him (mention other acts of insolvency under sec. 6, if any committed within the last three months)

In these circumstances your petitioner prays that your Honour be pleased (a) to appoint an interim receiver in respect of the estate of the said A B or (b) to make an order directing attachment by actual seizure of the entire property of the said A B

and (c) to order a warrant to issue for the arrest of the said A B and (d) to adjudge the said A B an insolvent and to pass such other orders as your Honour may think fit

And your petitioner etc

(Verification)

MODEL FORM No 3

Insolvency application where the Debtor is a Firm.

(*Vide* Calcutta Rules Nos 19-27, Madras Rules Cl XXVIII, Allahabad Rules Nos 22-30, Bombay Rules Cl XXVIII)

In the Court of the District Judge of Backargunj

INSOLVENCY CASE NO OF 1927

In the matter of A B an insolvent

The humble petition of Brown & Co a firm carrying on business as dealers in rice at in co partnership with A B and C D (the names and addresses in full of the individual partners) as partners under the name and style Brown & Co

Most respectfully sheweth

1 That your petitioners are carrying on business as dealers in rice as aforesaid at within the jurisdiction of this Court and that owing to (state the circumstances) have incurred pecuniary liabilities to the extent of Rs 10 000 which your petitioners' assets are insufficient to liquidate and which your petitioners are unable to pay

2 That the particulars of all pecuniary claims against your petitioners together with the names and residences of your petitioners' creditors so far as they are known to or can be ascertained by the exercise of reasonable care and diligence by your petitioners are set forth in schedule A annexed hereunto

3 That an order has been made in Execution Case No of— for attachment of your petitioners' properties by the Subordinate Judge's Court of Barisal in execution of the decree dated the made by the said Subordinate Judge's Court in Money suit No of 19 in favour of one (so and so) against your petitioners' firm for recovery of Rs

(*This paragraph will be necessary only if there is any attachment*)

4 That your petitioners beg leave to set forth a true and correct statement of the partnership properties and affairs of Brown & Co together with a specification of their values and the places where they are situate in schedule B hereunto annexed as also a similar statement with like specification of the separate properties and affairs of the

aforesaid individual parties in schedules C, D, E and F, also annexed hereunto

5 That your petitioners are willing to place at the disposal of the Court all of the said properties excepting those which are exempt from attachment and sale under the law

6 That your petitioners crave leave to file herewith the books of account of the said firm, truly and regularly kept in the course of business, as well as those of the individual partners

7 That neither the petitioning firm nor any of its members has on any previous occasion filed any petition for adjudication as insolvent or insolvents

Under the aforesaid circumstances your petitioners pray that your Honour may be pleased to adjudge the firm of Brown & Co insolvent and to pass such other order or orders as the Court may think fit and proper

And your petitioners as in duty bound shall ever pray

We, the members of the firm of Brown & Co do hereby declare etc

Signatures of A, B, C and D

N B If the petition is signed by one partner only, the partner signing for the firm shall add his own signature, e.g. "Brown & Co by James Green, a partner in the said Firm" and the petition shall be accompanied by an affidavit by him stating that all the other partners concur in the filing of the petition

MODEL FORM No 4

Application for withdrawal under Sec. 14.

(Cause title)

The humble petition of A B of

Most respectfully sheweth

1 That your petitioner made on (date) an application to the Court to be adjudged an insolvent, notice whereof has duly been given to all the creditors mentioned therein and that the said application is still pending and no order of adjudication has yet been made

2 That since the filing of the said application your petitioner has inherited a rich legacy from (a certain relation) and expects to be able to pay all his creditors in full and that your petitioner had a discussion over his affairs with the said creditors who have all agreed

that the case should be taken out of Court in order to give your petitioner an opportunity to realise the said legacy and to pay off his debts therewith

3 That the law not permitting any withdrawal of any Insolvency case without the leave of the Court, it is necessary to obtain from your Honour the necessary permission sanctioning the desired withdrawal of the case

Therefore under the aforesaid circumstances and in view of the fact that all the creditors are agreeable to withdrawal of the case, your petitioner prays that your Honour may be pleased to grant leave to your petitioner to withdraw from the aforesaid case and to make such other order or orders as your Honour might think fit

And your petitioner as in duty bound shall ever pray

Affidavit.

I (so and so) son of (so and so) by caste by profession at present residing at do hereby solemnly affirm and say as follows —

1 That I am the petitioner abovenamed and am well acquainted with the facts of the case

2 That the facts stated in the above application are all true to my own knowledge

(Sd) Signature

Sworn before me etc

(Commissioner of affidavit)

MODEL FORM No 5

Creditor's application under Secs. 20-21 for an Interim Receiver and Interim Proceedings.

(Cause Title)

In the matter of (etc)

The humble petition of C D, creditor
No in the aforesaid case

Most respectfully sheweth

1 That your petitioner as a creditor of the debtor abovenamed presented an application to have the said debtor adjudged an insolvent and that the said application is now pending in this Court

2 That your petitioner caused a notice of the above application to be duly served on the said debtor on (date) and that your petitioner has been informed by (so and so), a neighbour of the said debtor, and your petitioner believes the said information to be true, that on receipt of the said notice, the said debtor has removed considerable part of his household furniture with a view to defeat your petitioner's just claims

3 That your petitioner has further learnt that the said debtor is attempting to dispose of his motor car and is making arrangement to dispose of the rest of his properties which mainly consist of moveables and that unless immediate steps be taken to prevent it, the said debtor will practically leave nothing for the satisfaction of his huge debts

4 That information has reached your petitioner to the effect that the said debtor has given out that he will shortly be proceeding to (place) outside the jurisdiction of this Court to live there in seclusion with a relation of his

That under the aforesaid circumstances your petitioner humbly prays that your Honour may graciously be pleased (a) to appoint forthwith an interim Receiver and direct the receiver so appointed to take immediate possession of all the chattels and moveable properties of the said debtor, (b) to order the said debtor to give reasonable security for his appearance until final orders are made upon your petitioner's aforesaid application for the adjudication of the said debtor, and (c) to direct that in default of giving such security, the said debtor be detained in the civil prison and to pass such other order or orders as the Court may think fit and proper

And your petitioner as in duty bound shall ever pray

(An affidavit as before)

MODEL FORM No 6

Debtor's petition for release under Sec. 23.

In the Court of the District Judge of Faridpur

INSOLVENCY CASE NO OF 1927

The humble petition of A B
debtor in the aforesaid case

Most respectfully sheweth

1 That your petitioner owing to serious financial embarrassment and inability to pay his debts has filed his schedule of (or application insolvency and that the same has been admitted by an order dated the and that (date) has been fixed for hearing thereof

2 That since the admission of the insolvency petition as aforesaid one (so and so), who has got a decree for the payment of money against your petitioner in the local Subordinate Judge's Court in Money Suit No. of and who has been described as creditor No. 3 in your petitioner's application for insolvency, has applied for execution of the said decree and in execution thereof has got your petitioner arrested and that your petitioner is accordingly now in the custody of the said Subordinate Judge's Court

3 That your petitioner submits that the conduct of the said creditor No. 3 in getting your petitioner arrested is not at all *bona fide* and that the said creditor has adopted that course as a device to extort money by putting pressure upon your petitioner and thereby to gain an undue advantage over the rest of your petitioner's creditors

4 That your petitioner if not at once released will be seriously prejudiced in the matter of prosecuting his application for adjudication and of performing the legal duties of aiding in the realisation of his assets for the benefit of the general body of creditors and the said creditor No. 3 is not at all justified in persisting in his present policy of unnecessary harassment to your petitioner

5 That from the facts stated in your petitioner's application for adjudication, it will appear that your petitioner's bankruptcy has arisen from circumstances over which your petitioner had never any control and that your petitioner could never be held responsible for the same

6 That your petitioner is ready and willing to furnish such security as may reasonably be demanded of him as a condition precedent to his release

Therefore under the aforesaid circumstances your petitioner prays that your Honour may graciously be pleased to order release of your petitioner from detention as aforesaid and to pass such other order or orders as your Honour may think fit

And your petitioner as in duty bound shall ever pray

V B The petition is to be supported by an affidavit as above

MODEL FORM No. 7

Debtor's application for protection order under Sec. 31.

In the Court of the District Judge of 24 Pergannas

INSOLVENCY CASE NO. OF 1927

In the matter of

The humble petition of A B C the
the insolvent above named

Most respectfully sheweth

1 That your petitioner has been adjudged an insolvent by an order of this Court dated the made in the aforesaid case

he may be called upon to do so and do and shall carefully and properly observe, perform, keep, carry out all orders, mandates, directions of the said Court of Judge, then this obligation or the bond shall be void and of no effect, otherwise the same shall remain in full force and be effective

Signed, sealed and delivered by the abovenamed AB, XY and VZ in the presence of (witness)

N B —A stamp duty is payable for the security bond under the Indian Stamp Act, Sch I Arts, 2 57, see 42 C L J 5 (F B) also Art 6, Sch II of the Court Fees Act

MODEL FORM No 10

Debtor's application for award of compensation under sec. 26.

In the Court of etc

(Cause title)

The humble petition of A B of

Most respectfully sheweth

1 That one (so and so) alleging himself to be a creditor of your petitioner surreptitiously filed an insolvency application in this Court against your petitioner and that the said application has been rightly dismissed by this Court under sec 25 (1) of the Insolvency Act by an order dated the

2 That the said petition was absolutely frivolous and was engineered with the obvious object of humiliating your petitioner in society and of preventing your petitioner from being elected a member of the local Legislative Council

Therefore your petitioner prays that your Honour be pleased to award to your petitioner one thousand rupees as compensation for the expense and injury occasioned to your petitioner by the said frivolous and vexatious petition and to pass such other order or orders as this Court might think fit and proper

And your petitioner as in duty bound shall ever pray

V B —An affidavit is necessary For form see at p 565 ante

MODEL FORM No 11

Application under sec. 32 for the arrest of an absconding insolvent.

N B—Such an application can be made by a creditor or the Receiver

Cause Title (as before)

In the matter of etc

The humble petition of H C of

Most respectfully sheweth

1 That A B C of has been adjudicated an insolvent in the above case by an order of this Court dated the

2 That by an order dated the your Honour was pleased to call upon the said insolvent to file in this Court all his books of account and to prepare an inventory of all his moveable property and to make them over to Mr so and so who has been appointed a receiver in this case

3 That most of the moveables in the possession of the insolvent consist of such articles as cannot be easily rendered marketable without the assistance of the insolvent who has got a special knowledge in that direction

4 That the said debtor with intent to avoid the obligations imposed on him as to the production of the books of account and the preparation of the inventory and to avoid rendering of assistance as above has suddenly departed from the local limits of the jurisdiction of this Court

5 That unless the said insolvent be immediately arrested and brought before the Court and compelled to carry out the aforesaid obligations his assets will remain unrealised and your petitioner and the rest of the creditors will be seriously prejudiced thereby

Therefore under the aforesaid circumstances your petitioner prays that your Honour be graciously pleased to order a warrant to issue for the immediate arrest and production before the Court of the said insolvent and to pass such other order or orders as this Court may think fit and proper

And your petitioner as in duty bound shall ever pray

Observe The application has to be supported by an affidavit When the application is made by a receiver who has no personal knowledge of the facts the Court may dispense with the affidavit treating the application as the receiver's report or the receiver may swear the affidavit only on information

MODEL FORM No 12

Proof of Debt under sec. 33.*Vide at pp 505 and 526, ante*

MODEL FORM No 13

**Debtor's application for Annulment of Adjudication under
sec. 35.**

In the Court of the District Judge of Mymensingh

Insolv Case No

of 1927

The humble petition of A B of

Most respectfully sheweth

1 That at the instance of one (so-and so) who alleging himself to be a creditor of your petitioner started the aforesaid insolvency proceeding your petitioner was adjudicated an insolvent by an order of the Court dated the

2 That the said so-and so filed the insolvency application absolutely on false allegations and without any notice to your petitioner and that as your petitioner was not indebted to the said creditor for a sum exceeding five hundred rupees, the said creditor has no right to present any insolvency petition against your petitioner

3 That it is not true as alleged by the said creditor that your petitioner gave notice to his creditor that he had suspended, or that he was about to suspend payment of his debts, and that as a matter of fact your petitioner never gave any such notice to any body

4 That your petitioner has all along been able to pay off his liabilities as they became due and possesses quite sufficient assets to liquidate all his debts and ought not to have been adjudged an insolvent

5 That as a matter of fact since the aforesaid adjudication order all the debts of your petitioner have been paid in full

Therefore your petitioner prays that your Honour may graciously be pleased to annul the adjudication made against your petitioner and to pass such other order or orders as the Court might think fit and proper

And your petitioner as in duty bound shall ever pray

N B —An affidavit in support of the petition is necessary

MODEL FORM No 14

Creditor's application for Annulment of Adjudication.

In the Court of the District Judge of Midnapore

Insolvency Case No	of 1927
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In the matter of ABC, an insolvent

The humble petition of XYZ of a creditor

Most respectfully sheweth

1 That the aforesaid insolvent was adjudicated as such on his own application by an order of this Court dated the

2 That the said insolvent ordinarily resides at (place) wholly outside the jurisdiction of this Court and is there employed as (occupation) but in order to obtain an easy adjudication behind the back of his creditors mostly residing several hundred miles away from this place and consequently beyond the reach of effective opposition, the said insolvent presented his insolvency petition before this Court on false allegations, though as a matter of fact this Court had absolutely no jurisdiction to entertain the same

3 That your petitioner not being served with any notice of the said insolvency petition, had never any opportunity prior to this to take any exception thereto on the ground of want of jurisdiction

4 That the said insolvent has shown his debts to be of the statutory amount of five hundred rupees in his schedule of bankruptcy but as a matter of fact most of them are mere bogus debts stated to be due to persons who are mostly his relations and friends and who are fraudulently helping him in his attempt to defeat his just creditors

5 That the said insolvent is in a solvent condition and has in his native village considerable properties which far exceed his liabilities and that his profession of inability to pay is wholly unfounded

6 That under the aforesaid circumstances the said A B C ought not to have been adjudged an insolvent and that his bankruptcy application filed in this Court has been a gross abuse of the processes of a Court of Justice

Your petitioner therefore most humbly prays that Honour may be pleased to annul the adjudication complained of above and to pass such other order or orders as this Court might think fit and proper

And your petitioner as in duty bound shall ever pray

N B An affidavit in support of the petition is necessary

MODEL FORM No 15

Application under sec. 36 for cancellation of concurrent orders of Adjudication.

In the Court of the District Judge of Burdwan

INSOLVENCY CASE NO OF 1927

The humble petition of A B of

Most respectfully sheweth

1 That your petitioner has been adjudged insolvent on his application by an order of the District Judge of Chittagong dated the day of

2 That one (date) one (so-and-so), a creditor of your petitioner applied before this Court for the adjudication of your petitioner and obtained an order of adjudication in the above case on (date) without issuing any proper notice upon your petitioner

3 That thus there has been two concurrent orders of adjudication in respect of your petitioner and in consequence, two insolvency proceedings are pending, one in this Court and the other in the District Court of Chittagong, and two receivers have likewise been appointed one here and the other at Chittagong, for the administration of your petitioner's estate

4 That your petitioner most respectfully submits that your petitioner being a native of Chittagong all his properties are situated within the jurisdiction of the Chittagong Court and can more conveniently be administered by that Court

5 That as a matter of fact your petitioner, in obedience to an order of the District Judge of Chittagong, has filed all his books of account in that Court, and placed all his moveable and immoveable properties in the hands of the receiver appointed by that Court

Therefore your petitioner prays that your Honour may graciously be pleased to annul the adjudication made against your petitioner in the above case and stay all proceedings in connection therewith and to pass such other order or orders as your Honour may think fit and proper

And your petitioner as in duty bound etc

N B —The petition has to be supported by an affidavit (as at p 565)

MODEL FORM No 16

Application under sec. 38 submitting a proposal for a composition or a scheme of arrangement.

In the Court of the District Judge of Coimbatore

Insolvency Case No of 1927

The humble petition of A B of

Most respectfully sheweth

1 That your petitioner has been adjudged insolvent in the above case by an order dated the day of

2 That the bankruptcy of your petitioner is the result of general depression in the commercial world and has not been brought on by any rash and hazardous speculations or any unjustifiable extravagance in living or like causes on the part of your petitioner

3 That your petitioner is trying his utmost to rehabilitate his business, and that with that end in view your petitioner approached all his creditors and proposed to them a composition in satisfaction of his debts and that nearly all the creditors having regard to your petitioner's affairs expressed their willingness to accept six annas in the rupee in full satisfaction of their claims and to discharge your petitioner from all liabilities to them

4 That the present assets of your petitioner do not bid fair to yield a dividend of more than three annas in the rupee but as the present market is favourable your petitioner expects to make some profit in his business and thereby hopes to be able to pay a composition of six annas in the rupee to his creditors but as that is likely to take some time it has been arranged with the creditors to pay the composition money in two half yearly instalments from date

5 That having regard to the aforesaid circumstances your petitioner and almost all the creditors consider the terms of the above proposal to be very fair and reasonable and well calculated to benefit the general body of creditors

If there are debts enjoying priority under section 61 say that this arrangement is absolutely without any prejudice to them and that due provisions have been made for their payment

Under the aforesaid circumstances your petitioner prays that your Honour may be pleased to approve the above proposal for composition and annul the order of adjudication

And your petitioner as in duty bound shall ever pray

N B —An affidavit is necessary as at p 565

MODEL FORM No 17

Application for discharge under sec. 41.

In the Court of the District Judge, Murshidabad

Insolvency Case No

The humble petition of A B of

Most respectfully sheweth

1 That your petitioner has been adjudged an insolvent in the above case by an order dated the day of and it was provided therein that your petitioner should apply for discharge on or before the day of

2 That your petitioner has absolutely no assets and consequently no dividend could be paid to the creditors or that the assets of your petitioner have been collected by the receiver appointed in the case and it is expected that the amount realised by the receiver will enable him to declare a dividend of five annas in the rupee

3 [State circumstances and the reasons why the insolvent's assets are not of a value equal to eight annas in the rupee and state why the insolvent should not be held responsible for those circumstances]

4 That your petitioner has regularly kept proper books of account showing his business transactions and financial position within the three years immediately preceding his insolvency and filed the same in Court.

5 That your petitioner never contracted any debt without a reasonable or probable ground of expectation of being able to pay the same, nor effected any transfer or given undue preference to any of his creditors contrary to the provisions of the Act, nor concealed or removed his property or any part thereof, nor has been guilty of any fraud or fraudulent breach of trust

6 That your petitioner has already satisfied your Honour that the loss or deficiency of your petitioner's assets or his bankruptcy was not due to any misconduct or any impeachable act on the part of your petitioner

Your petitioner therefore prays that your Honour may graciously be pleased to grant your petitioner an absolute order of discharge

And your petitioner as in duty bound shall ever pray

N B —For affidavit *vide* at p 565

MODEL FORM No 18

Petition under sec. 42 objecting to the grant of discharge.

In the Court of the District Judge of Nasik

INSOLVENCY CASE NO OF 1927

In the matter of an application for discharge by A B, an insolvent

The humble petition of X Y Z Creditor No 3
in the aforesaid Insolvency case

Most respectfully sheweth

1 That one A B who was adjudicated an insolvent on (date) has now applied to this Court for an order of discharge and notice of the same has been served on your petitioner

2 That your petitioner begs leave to take exception thereto on the following amongst other Grounds

Grounds of objections

i For that the assets of the insolvent on his own showing, are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities and that the insolvent has offered no satisfactory explanation of such deficiency

ii For that the account books filed by the insolvent are not genuine but have been concocted for the purposes of the present case

iii For that though the insolvent had been in hopelessly bankrupt circumstances for the last two years, still he continued to carry on his trade so that he might be in a position to contract further debts without any prospect of their repayment

iv For that the insolvent contracted debts provable under the Act without having at the time of contracting them any reasonable or probable ground of expectation that he would be able to pay them

v For that the insolvent was a speculator of the worst type and has brought on his insolvency by inconsiderate and hazardous speculations

vi For that the insolvent is also a habitual gambler and ran through *considerable part of his fortune by betting in horse races*

vii For that the insolvent was a man of profligate habits and *carried on his business in such a clumsy fashion that his conduct in relation thereto was practically of a culpable kind and his bankruptcy was mainly due thereto*

viii For that the insolvent has within three months preceding the date of the presentation of the petition when unable to pay the debts as they became due given an unfair preference to his creditor so-and

ix For that the insolvent has removed some of his valuable furniture and jewellery from his dwelling house and has kept them concealed from the creditors

Therefore, your petitioner prays that your Honour may be pleased to reject the insolvent's application for discharge with costs to your petitioner and to pass such other order or orders as your Honour may think fit and proper

And your petitioner as in duty bound shall ever pray

MODEL FORM No 19

Application under secs. 53 and 54A for avoidance of a voluntary transfer.

In the Court of the District Judge of 24 Pargannas

INSOLVENCY CASE NO

OF 1927

In the matter of

The humble petition of M N P, the Receiver appointed in the above case

Most respectfully sheweth

1 That one A B C has, on his own application, been adjudged insolvent by an order of this Court, dated the day of and your petitioner has been appointed a Receiver for his estate

2 That the said insolvent effected a transfer on (date) in respect of his property described in Schedule A annexed hereunto in favour of one(name and address) who is a relation of the insolvent and has, within two years of the said transfer, made the present bankruptcy petition

3 That the said transfer is not at all a *bona fide* transaction and is not made for any valuable consideration, but is effected in favour of a relation with the obvious intention of placing the property beyond the reach of the insolvent's creditors

4 That under the aforesaid circumstances, the said transfer is voidable against your petitioner and is liable to be annulled and the said property is liable to be distributed among the creditors

5 That your petitioner informed the said transferee (name) of the above circumstances and called upon him to make over the property to your petitioner but the said transferee refusing to comply with the re-

quisition is herein impleaded as an opposite party and a notice of this application may be served upon him

Therefore your petitioner most humbly prays that your Honour may be pleased to declare the above transfer void against your petitioner and to annul the same and to pass such other order or orders as your Honour may think fit and proper

And your petitioner as in duty bound shall ever pray

(Schedule of Property)

N B The petition should be supported by an affidavit

MODEL FORM No 20

Petition under secs. 54 and 54A for avoidance of a fraudulent preference.

In the Court of the District Judge of Nadia

INSOLVENCY CASE NO OF 1927

In the matter of A B C an insolvent

Receiver (name) petitioner

vs

Creditor favoured (Name and address) Opposite Party

The humble petition of M N P the receiver
aforesaid

Most respectfully sheweth

1 That one A B C has on his own application been adjudged an insolvent by an order of this Court, dated the day of and your petitioner has been appointed a Receiver for his estate

2 That on or about (date) the said insolvent effected a transfer of his property fully described in Schedule A hereunto annexed or made a payment of a sum of Rs 3000 in favour of or to the aforesaid opposite party (so-and so) who is a creditor of the insolvent with a view of giving that creditor a preference over the other creditors of the insolvent

3 That the said transfer was effected or the payment was made at a time when the said insolvent was unable to pay his debts as they became due from his own money and that it took place within three months from the date of the presentation of the insolvency petition by the said A B C

4 That under the aforesaid circumstances, the said transfer payment is fraudulent under the law and is void as against your petitioner and as such liable to be annulled.

5 That your petitioner called upon the said creditor (opposite party) to make restitution in respect of the property or money taken by him under the transaction complained of, but on his refusal to comply with the requisition he is impleaded herein as an opposite party and a decree of this application may be served upon him.

Your petitioner, therefore, humbly prays that your Honour may be pleased to declare the said transfer or payment fraudulent and void and to annul the same and to pass such other order or orders as this Court may think fit and proper.

And your petitioner as in duty bound shall ever pray

(Schedule of Property)

N B The petition should be supported by an affidavit.

MODEL FORM No 21

Creditor's petition for annulment under sec. 54A.

(Cause title as in Forms 19 and 20)

The humble petition of XYZ, one of the creditors of the aforesaid insolvent

Most respectfully sheweth

1 That the aforesaid A B C was, on his own application, adjudged an insolvent by an order of this Court, dated the day of and Mr M N P has been appointed a receiver for the insolvent estate

2 & 3 As in forms 19 and 20, above

4 That under the aforesaid circumstances, the said transfer is void against the receiver and is liable to be annulled and the property or the money should be seized and distributed among the creditors of the insolvent

5 That your petitioner wrote a registered letter to the said Mr M N P, the receiver of the insolvent estate, requesting him to take action under sec 53 or sec 54 (as the case may be), but the said Mr M N P has expressed his unwillingness to take any action in the matter. A copy of the said letter, the postal receipts for the same and the reply given by said Mr M N P, in original, are filed herewith and may be used in evidence

6 That under the circumstances your petitioner is desirous of taking action for annulment under sec 53 or sec 54, but as that can be done under the law only with the leave of the Court your petitioner craves such leave from your Honour

Therefore your petitioner prays that your Honour may be pleased to give your petitioner the necessary leave for this application and to declare the said transfer or payment void against the receiver and to annul the same and to pass such other order or orders as your Honour may think fit and proper

And your petitioner as in duty bound shall ever pray

N B An affidavit in support of the petition is necessary

MODEL FORM No 22

Proof of debts of Workmen under sec. 61.

Vide at p 525 ante

MODEL FORM No 23

Application for enquiry into an Insolvency Offence under Sec. 70.

In the Court of the District Judge of Dacca

INSOLVENCY CASE NO OF 1927

In the matter of etc

The humble petition of M N P Receiver appointed for the property of the aforesaid insolvent

Most respectfully sheweth

1 That your petitioner on or about (date) by a formal letter, a copy whereof is filed herewith called upon the aforesaid insolvent to produce before your petitioner all his books of account and to furnish a correct inventory of his moveables or to attend your petitioner's office for examination in respect of certain important matters in accordance with the provisions of sec 22 or to deliver up possession of the property mentioned in the schedule below, but the insolvent wilfully and contumaceously failed to perform the same

2 That the said insolvent, fraudulently with intent to conceal the state of his affairs or to defeat the objects of this Insolvency Act has destroyed or purposely withheld the production of (particulars of the documents) or filed false account books, or made false entries therein or falsified (documents) by (method)

3 That the said insolvent, fraudulently with intent to diminish the sum to be divided amongst his creditors or to give an undue preference to creditor No 3, (i) has discharged or concealed the following debts due to him, or (ii) has disposed of, charged, mortgaged or concealed the property described in the schedule below

Therefore your petitioner prays that your Honour may be pleased to hold an enquiry into the aforesaid offences and make a complaint to the local Criminal Court in accordance with the provisions of sec 70 of the Provincial Insolvency Act
And your petitioner as in duty bound shall ever pray

MODEL FORM No 24

Petition for leave to appeal under sec. 75(3).

In the Court of the District Judge of Backergunj

INSOLVENCY CASE NO

OF 1927

The humble petition of A B of in the above case

Most respectfully sheweth

1 That your petitioner made an application under sec. 30 for annulment of adjudication made against him on the ground that the petitioning creditor had no right to present any insolvency application against your petitioner and that your petitioner ought not to have been adjudged an insolvent

2 That your Honour was pleased to overrule your petitioner's contention and to reject your petitioner's said application by an order, and the

3 That your petitioner being seriously aggrieved by the said order intends to prefer an appeal thereagainst to the Hon'ble High Court

4 That your petitioner has been advised and submits that the present case involves a fine question of law and is a fit one in which leave to appeal ought to be granted

Therefore your petitioner humbly prays that your Honour may be pleased to grant leave to appeal against the aforesaid order
And your petitioner as in duty bound shall ever pray

MODEL FORM NO 25

Memorandum of Appeal or Cross-Objection.*Vide Civil Procedure Code*

For the **Other Forms** see the forms annexed to the various High Court Rules, pp 500-508, 523-534, 540-548, 549-560

APPENDIX G.
THE PRESIDENCY TOWNS
INSOLVENCY ACT, 1909

(III OF 1909)

(AS MODIFIED UP TO 1ST AUGUST, 1930)

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ACT NO. III OF 1909.¹

[12th March 1909]

An Act to amend the law of Insolvency in the Presidency towns and the town of Rangoon.

[As modified up to 1st August, 1930]

WHEREAS it is expedient to amend the law relating to insolvency in the Presidency towns and the ²[towns of Rangoon and Karachi] it hereby enacted as follows —

PRELIMINARY

Short title and commencement

1. (1) This Act may be called the Presidency-towns Insolvency Act, 1909

(2) It shall come into force on the first day of January 1910

Definitions

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) 'creditor' includes a decree holder,

(b) "debt" includes a judgment-debtor, and "debtor" includes a judgment-debtor,

³[(bb) 'judge' includes a Judicial Commissioner and an Additional Judicial Commissioner,

(bbb) 'limits of the ordinary original civil jurisdiction' means, in respect of the ⁴[Court of the Judicial Commissioner of Sind] the limits of the municipal district of Karachi as from time to time constituted under the Bombay District Municipal Act, 1901, the Port of Karachi, the Cantonments of Karachi and Manora, and any area within the original civil jurisdiction of the said Court notified in this behalf by the Local Government]

¹For Statement of Objects and Reasons, see Gazette of India 1909 Pt V p 275 for Report of Special Committee see *ibid* 1909 Pt V page 3 and for Proceedings in Council see *ibid*, 1909 Pt VI pages 41 and 182 and *ibid*, 1909, Pt VI pages 12 and 22

²These words were substituted for the words "town of Rangoon" by the Insolvency (Amendment) Act 1926 (IX of 1926)

³These definitions were inserted by s. 3, *ibid*

⁴The words "Chief Court of Sind" are to be read for the words "Court of the Judicial Commissioner of Sind" when the Sindh Courts (Supplementary) Act 1926 (34 of 1926) comes into force

- (c) official assignee includes an acting official assignee ⁵(and a deputy official assignee)
- (d) prescribed means prescribed by rules
- (e) property includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit
- (f) rules means rules made under this Act
- (g) secured creditor includes a landlord who under any enactment for the time being in force has a charge on land for the rent of that land
- (h) the Court means the Court exercising jurisdiction under this Act and
- (i) transfer of property includes a transfer of any interest therein and any charge created thereon

PART I

CONSTITUTION AND POWERS OF COURT

Jurisdiction

Courts having jurisdiction in insolvency 3 The Courts having jurisdiction in insolvency under this Act shall be—

- (a) the High Courts of Judicature at Fort William, Madras ⁶[Bombay and Rangoon], and
- (b) ⁷[the Court of the Judicial Commissioner of Sind]

4 All matters in respect of which jurisdiction is given by this Act shall be ordinarily transacted and disposed of by or under the direction of one of the Judges of the Court, and the Chief Justice or ⁸[Judicial Commissioner] shall, from time to time assign a Judge for that purpose

⁵ These words have been added by act X of 1930 which received the assent of the G. G. on 26.3.1930

⁶ The words were substituted for the words and Bombay by the Insolvency (Amendment) Act 1926 (IX of 1926)

⁷ The words were inserted by the Insolvency (Amendment) Act 1926 (IX of 1926) and are to be repealed by the words the Chief Court of Sind when the Sind Courts (Supplementary) Act 1926 (XXXIV of 1926) comes into force

⁸ The words were substituted by the Insolvency (Amendment) Act 1926 (IX of 1926) and are to be replaced by the words Chief Judge when Act XXXIV of 1926 comes into force

5. Subject to the provisions of this Act and of rules, the Judge of a Court exercising jurisdiction in insolvency may exercise in chambers the whole or any part of his jurisdiction

Exercise of jurisdiction in chambers

6. (1) The Chief Justice or ⁹[Judicial Commissioner] may from time to time ¹⁰direct that, in any matters in respect of which jurisdiction is given to the Court by this Act, an officer of the Court appointed by him in this behalf shall have all or any of the powers in this section mentioned, and any order made or act done by such officer in the exercise of the said powers shall be deemed the order or act of the Court

Delegation of powers to officers of Court

(2) The powers referred to in sub section (1) are the following namely —

(a) to hear insolvency petitions presented by debtors, and to make orders of adjudication thereon,

(b) to hold the public examination of insolvents,

(c) to make any order or exercise any jurisdiction which is prescribed as proper to be made or exercised in chambers,

(d) to hear and determine any unopposed or *ex parte* applications

(e) to examine any person summoned by the Court under section

(3) An officer appointed under this section shall not have power to commit for contempt of Court

7. Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a correct distribution of property in any such case

Power of Court to decide all questions arising in insolvency

¹¹[Provided that, unless all the parties otherwise agree, the power hereby given shall for the purpose of deciding any matter arising under section 36, be exercised only in the manner and to the extent provided in that section]

⁹ These words were substituted by the Insolvency (Amendment) Act, 1926 (IX of 1926) and are to be replaced by the words "Chief Judge" when Act XXXIV of 1926 comes into force

¹⁰ For order issued by Chief Justice of High Court Madras see Fort St George Gazette 1910 Pt II p 735

¹¹ This proviso was added by s 2 of the Presidency-towns Insolvency (Amendment) Act (XIX of 1927)

Appeals

8. (1) The Court may review, rescind or vary any order made by it under its insolvency jurisdiction

(2) Orders in insolvency matters shall, at the instance of any person aggrieved, be subject to appeal as follows, namely —

- (a) an appeal from an order made by an officer of the Court empowered under section 6 shall lie to the Judge assigned under section 4 for the transaction and disposal of matters insolvency and no further appeal shall lie except by leave of such Judge,
- (b) save as otherwise provided in clause (a), an appeal from an order made by a Judge in the exercise of the jurisdiction conferred by this Act shall lie in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court

PART II

PROCEEDINGS FROM ACT OF INSOLVENCY TO DISCHARGE

Acts of insolvency

9. A debtor commits an act of insolvency in each of the following cases, namely —

- (a) if, in British India or elsewhere, he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally,
- (b) if, in British India or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors,
- (c) if, in British India or elsewhere, he makes any transfer of his property or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent,
- (d) if, with intent to defeat or delay his creditors,—
 - (i) he departs or remains out of British India,
 - (ii) he departs from his dwelling-house or usual place of business or otherwise absents himself,
 - (iii) he secludes himself so as to deprive his creditors of the means of communicating with him,
- (e) if any of his property has been sold or attached for a period of not less than twenty-one days in execution of the decree of any Court for the payment of money,

- (f) if he petitions to be adjudged an insolvent,
- (g) if he gives notice to any of his creditors that he has suspended or that he is about to suspend, payment of his debts
- (h) if he is imprisoned in execution of the decree of any Court for the payment of money

Explanation—For the purposes of this section, the act of an agent may be the act of the principal, even though the agent have no special authority to commit the act

Order of adjudication

10. Subject to the conditions specified in this Act, if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Court may on such petition make an order (hereinafter called an order of adjudication) adjudging him an insolvent

Explanation—The presentation of a petition by the debtor shall be deemed an act of insolvency within the meaning of this section, and on such petition the Court may make an order of adjudication

11. The Court shall not have jurisdiction to make an order of adjudication unless—

- (a) the debtor is, at the time of the presentation of the insolvency petition, imprisoned in execution of the decree of a Court for the payment of money in any prison to which debtors are ordinarily committed by the Court in the exercise of its ordinary original jurisdiction, or
- (b) the debtor, within a year before the date of the presentation of the insolvency petition, has ordinarily resided or had a dwelling house or has carried on business either in person or through an agent within the limits of the ordinary original civil jurisdiction of the Court, or
- (c) the debtor personally works for gain within those limits, or
- (d) in the case of a petition by or against a firm of debtors the firm has carried on business within a year before the date of the presentation of the insolvency petition within those limits

12. (1) A creditor shall not be entitled to present an insolvency petition against a debtor unless—

- (a) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to five hundred rupees, and
- (b) the debt is a liquidated sum payable either immediately or at some certain future time, and

(c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition

(2) If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent or given an estimate of the value of the security. In the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor

13.(1) A creditor's petition shall be verified by affidavit of the Proceedings and order creditor, or of some person on his behalf on creditor's petition having knowledge of the facts

(2) At the hearing the Court shall require proof of—

(a) the debt of the petitioning creditor, and

(b) the act of insolvency or, if more than one act of insolvency is alleged in the petition, some one of the alleged acts of insolvency

(3) The Court may adjourn the hearing of the petition and order service thereof on the debtor

(4) The Court shall dismiss the petition—

(a) if it is not satisfied with the proof of the facts referred to in sub-section (2), or

(b) if the debtor appears and satisfies the Court that he is able to pay his debts, or that he has not committed an act of insolvency or that for other sufficient cause no order ought to be made

(5) The Court may make an order of adjudication if it is satisfied with the proof above referred to, or if on a hearing adjourned under sub-section (3) the debtor does not appear and service of the petition on him is proved unless in its opinion the petition ought to have been presented before some other Court having insolvency jurisdiction

(6) Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the Court on such security (if any) being given as the Court may require for payment to the petitioner of any debt which may be established against the debtor in due course of law, and of the costs of establishing the debt may instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt

(7) Where proceedings are stayed, the Court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make an order of adjudication on the petition of some other creditors, and shall thereupon dismiss, on the terms as it thinks just, the petition on which proceedings have been stayed as aforesaid

(8) A creditor's petition shall not, after presentation, be withdrawn without the leave of the Court.

Conditions on which debtor may petition

14. ¹²[1] A debtor shall not be entitled to present an insolvency petition unless—

- (a) his debts amount to five hundred rupees, or
- (b) he has been arrested and imprisoned in execution of the decree of any Court for the payment of money, or
- (c) an order of attachment in execution of such a decree has been made and is subsisting against his property

¹³[(2) A debtor in respect of whom an order of adjudication, whether made under this Act or under the Provincial Insolvency Act, 1920 has been annulled owing to his failure to apply or to prosecute an application for his discharge shall not be entitled to present an insolvency petition without the leave of the Court by which the order of adjudication was annulled. Such Court shall not grant leave unless it is satisfied either that the debtor was prevented by any reasonable cause from presenting or prosecuting his application, as the case may be, or that the petition is founded on facts substantially different from those contained in the petition on which the order of adjudication was made.]

15. (1) A debtor's petition shall allege that the debtor is unable to pay his debts, and, if the debtor proves that he is entitled to present the petition, the Court may thereupon make an order of adjudication, unless in its opinion the petition ought to have been presented before some other Court having insolvency jurisdiction.

Proceeding and order on debtor's petition

(2) A debtor's petition shall not, after presentation, be withdrawn without the leave of the Court.

¹⁴[(3) On the making of the order admitting his petition, a debtor shall—

(a) unless the Court otherwise directs, produce all his books of account, and

(b) file such lists of creditors and debtors and afford such assistance to the Courts as may be prescribed,

failing which the Court may dismiss his petition.]

16. The Court may, if it is shown to be necessary for the protection of the estate, at any time after the presentation of an insolvency petition and before an order of adjudication is made, appoint the official assignee to be interim receiver of the property of the debtor, or of any part thereof, and direct

Discretionary powers as to appointment of interim receiver

¹² This section was re-numbered by the Insolvency (Amendment) Act 1927 (11 of 1927)

¹³ This subsection was added by the Insolvency (Amendment) Act 1927 (11 of 1927)

¹⁴ This subsection was added by the Presidency towns Insolvency (Amendment) Act 1927 (19 of 1927)

him to take immediate possession thereof or any part thereof, and the official assignee shall thereupon have such of the powers conferable on a receiver appointed under the Code of Civil Procedure, 1908 as may be prescribed

17. On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the official assignee and shall become divisible among his creditors, and thereafter, except as directed by this Act no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose

Provided that this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed

18. (1) The Court may at any time after the making of an order of adjudication, stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court

(2) An order made under sub section (1) may be served by sending a copy thereof under the seal of the Court by post to the address for service of the plaintiff or other party prosecuting such suit or proceeding, and notice of such order shall be sent to the Court before which the suit or proceeding is pending

(3) Any Court in which proceedings are pending against a debtor may on proof that an order of adjudication has been made against him under this Act either stay the proceedings or allow them to continue on such terms as it may think just

18A.¹ (1) The Court may, at any time after the presentation of an insolvency petition, stay any insolvency proceedings pending against the debtor in any Court subject to the superintendence of the Court and may, at any time after the making of an order of adjudication annul an adjudication against the debtor made by any such Court

(2) Where any adjudication is annulled under sub section (1), all sales and dispositions of property and payments duly made and all acts done by the Court whose order is annulled, or by the receiver appointed by it or other person acting under his authority, shall be valid, but the

¹ This sec 18A has been added by Act X of 1930 which received the assent of the G. G. on the 20.3.1930

property vested in such Court or receiver shall vest in the official assignee, and the Court may make such direction in regard to the custody of such property as it thinks fit

(3) Notice of the order annulling an adjudication under sub-section (1) shall be published in the local Official Gazette and in such other manner as may be prescribed

19. (1) If in any case the Court, having regard to the nature of the debtor's estate or business or to the interests of the creditors generally, is of opinion that a special manager of the estate or business ought to be appointed to assist the official assignee the Court may appoint a manager thereof accordingly to act for such time as the Court may authorize, and to have such powers of the official assignee as may be entrusted to him by the official assignee or as the Court may direct

(2) The special manager shall give security and furnish accounts in such manner as the Court may direct, and shall receive such remuneration as the Court may determine

20. Notice of every order of adjudication, stating the name, address and description of the insolvent, the date of the adjudication, the Court by which the adjudication is made and the date of presentation of the petition, shall be published in the Gazette of India and in the local official Gazette and in such other manner as may be prescribed

Annulment of adjudication

21. (1) Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full, the Court may, on the application of any person interested, by order annul the adjudication¹⁶ [and the Court may of its own motion or on application made by the official assignee or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of section 14 not entitled to present such petition]

(2) For the purposes of this section, any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond in such sum and with such sureties as the Court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid in a Court

¹⁶ These words were added by the Insolvency (Amendment) Act 1927 (II of 1927)

22. Where it is proved to the satisfaction of the Court that insolvency proceedings are pending in any other British Court whether within or without British India against the same debtor and that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or may stay all proceedings thereon

23. (1) Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all

acts therefore done, by the official assignee or other person acting under his authority, or by the Court, shall be valid, but the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such terms and subject to such conditions (if any) as the Court may declare by order

(2) Where a debtor has been released from custody under the provisions of this Act and the order of adjudication is annulled as aforesaid, the Court may, if it thinks fit, recommit the debtor to his former custody, and the jailor or keeper to the prison to whose custody such debtor is so recommitted shall receive such debtor into his custody according to such recommitment, and thereupon all processes which were in force against the person of such debtor at the time of such release as aforesaid shall be deemed to be still in force against him as if such order had not been made

(3) Notice of the order annulling an adjudication shall be published in the Gazette of India and in the local official Gazette and in such other manner as may be prescribed

Proceedings consequent on order of adjudication

24. (1) Where an order of adjudication is made against a debtor, he shall prepare and submit to the Court a schedule verified by affidavit, in such form and containing such particulars of and in relation to his affairs as may be prescribed

(2) The schedule shall be so submitted within the following times, namely —

- (a) if the order is made on the petition of the debtor, within thirty days from the date of the order,
- (b) if the order is made on the petition of a creditor, within thirty days from the date of service of the order

(3) If the insolvent fails, without reasonable excuse, to comply with the requirements of this section, the Court may, on the application of the official assignee or of any creditor, make an order for his committal to the civil prison

(4) If the insolvent fails to prepare and submit any such schedule as aforesaid, the official assignee may, at the expense of the estate cause such a schedule to be prepared in manner prescribed

25. (1) Any insolvent who shall have submitted his schedule as aforesaid may apply to the Court for protection, and the Court may, on such application, make an order for the protection of the insolvent from arrest or detention

Protection order

(2) A protection order may apply either to all the debts mentioned in the schedule or to any of them as the Court may think proper and may commence and take effect at and for such time as the Court may direct, and may be revoked or renewed as the Court may think fit

(3) A protection order shall protect the insolvent from being arrested or detained in prison for any debt to which such order shall apply and any insolvent arrested or detained contrary to the terms of such order shall be entitled to his release

Provided that no such order shall operate to prejudice the right of any creditor in the event of such order being revoked or the adjudication annulled

(4) Any creditor shall be entitled to appear and oppose the grant of a protection order, but the insolvent shall be *prima facie* entitled to such order on production of a certificate signed by the official assignee that he has so far conformed to the provisions of this Act

(5) The Court may make a protection order before an insolvent has submitted his schedule if it thinks it necessary to do so in the interests of the creditors

26. (1) At any time after the making of an order of adjudication against an insolvent, the Court, on the application of a creditor or of the official assignee

Meetings of creditors

may direct that a meeting of creditors shall be held to consider the circumstances of the insolvency and the insolvent's schedule and his explanation thereof and generally as to the mode of dealing with the property of the insolvent

(2) With respect to the summoning of and proceedings at a meeting of creditors the rules in the First Schedule shall be observed

27. (1) Where the Court makes an order of adjudication it shall hold a public sitting on a day to be appointed

Public examination of the insolvent

by the Court, of which notice shall be given to creditors in the prescribed manner, for the examination of the insolvent, and the insolvent shall attend thereat, and shall be examined as to his conduct, dealings and property

(2) The examination shall be held as soon as conveniently may be after the expiration of the time for the filing of the insolvent's schedule

(3) Any creditor who has tendered a proof or a legal practitioner on his behalf may question the insolvent concerning his affairs and the causes of his failure

(4) The official assignee shall take part in the examination of the insolvent and for the purpose thereof subject to such directions as the Court may give may be represented by a legal practitioner

(5) The Court may put such questions to the insolvent as it may think expedient

(6) The insolvent shall be examined upon oath and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing and shall be read over either to or by the insolvent and signed by him and may thereafter be used in evidence against him and shall be open to the inspection of any creditor at all reasonable times

(7) When the Court is of opinion that the affairs of the insolvent have been sufficiently investigated it shall by order declare that his examination is concluded but such order shall not preclude the Court from directing further examination of the insolvent whenever it may deem fit to do so

(8) Where the insolvent is a lunatic or suffers from any such mental or physical affliction or disability as in the opinion of the Court makes him unfit to attend his public examination or is a woman who according to the customs and manners of the country ought not to be compelled to appear in public the Court may make an order dispensing with such examination or directing that the insolvent be examined on such terms in such manner and at such place as to the Court seems expedient

Composition and schemes of arrangement

28. (1) An insolvent may at any time after the making of an order of adjudication submit a proposal for a composition in satisfaction of his debts or a proposal for a composition in satisfaction of his debts or a proposal for a scheme of arrangement of his affairs in the prescribed form and such proposal shall be submitted by the official assignee to a meeting of creditors

(2) The official assignee shall send to each creditor who is mentioned in the schedule or who has tendered a proof before the meeting a copy of the insolvent's proposals with a report thereon, and if on the consideration of such proposal the majority in number and three fourths in value of all the creditors whose debts are proved resolve to accept the proposal the same shall be deemed to be duly accepted by the creditors

(3) The insolvent may at the meeting amend the terms of his proposal if the amendment is in the opinion of the official assignee calculated to benefit the general body of creditors

(4) Any creditor who has proved his debt may assent to or dissent from the proposal by a letter in the prescribed form addressed to official assignee so as to be received by him not later than the day

ceding the meeting, and any such assent or dissent shall have effect as if the creditor had been present and had voted at the meeting

29. (1) The insolvent or the official assignee may after the proposal

is accepted by the creditors apply to the Court to approve it, and notice of the time appointed for hearing the application shall be given to each creditor who has proved

(2) Except where an estate is being summarily administered or special leave of the Court has been obtained the application shall not be heard until after the conclusion of the public examination of the insolvent. Any creditor who has proved may be heard by the Court in opposition to the application notwithstanding that he may at a meeting of creditors have voted for the acceptance of the proposal

(3) The Court shall before approving the proposal hear a report of the official assignee as to the terms thereof and as to the conduct of the insolvent and any objections which may be made by or on behalf of any creditor

(4) Where the Court is of opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors or in any case in which the Court is required to refuse the insolvent's discharge the Court shall refuse to approve the proposal

(5) Where any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge, the Court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than four annas in the rupee on all the unsecured debts provable against the debtor's estate

(6) No composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent.

(7) In any other case the Court may either approve or refuse to approve the proposal

30. (1) If the Court approves the proposal, the terms shall be embodied in an order of the Court and as

Order on approval order shall be made annulling the adjudication and the provisions of section 23 sub-

sections (1) and (3) shall thereupon apply, and the composition or scheme shall be binding on all the creditors so far as relates to any debt due to them from the insolvent and provable in insolvency

(2) The provisions of the composition or scheme may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court

31. (1) If default is made in the payment of any instalment due in pursuance of any composition or scheme

Power to readjust approved as aforesaid or if it appears to the debtor insolvent Court that the composition or scheme cannot proceed without injustice or undue delay or

that the approval of the Court was obtained by fraud the Court may if it thinks fit on application by any person interested readjust the debt or insolvent and annul the composition or scheme and the property of the debtor shall thereupon vest in the official assignee but without prejudice to the validity of any transfer or payment duly made or of anything duly done under or in pursuance of the composition or scheme

(2) Where a debtor is readjusted insolvent under sub-section (1), all debts provable in other respects which have been contracted before the date of such readjustment shall be provable in the insolvency

32. Notwithstanding the acceptance and approval of a composition or scheme the composition or scheme shall not be binding on any creditor so far as regards a debt or liability from which under the provisions of this Act the insolvent would not be discharged by an order of discharge in insolvency unless the creditor assents to the composition or scheme

Control over person and property of insolvent

33. (1) Every insolvent shall unless prevented by sickness or other sufficient cause attend any meeting of his creditors which the official assignee may require him to attend and shall submit, to such examination and give such information as the meeting may require

Duties of insolvent as to discovery and realization of property

(2) The insolvent shall—

- (a) give such inventory of his property such list of his creditors and debtors and of the debts due to and from them respectively
- (b) submit to such examination in respect of his property or his creditors
- (c) wait at such times and places on the official assignee or special manager
- (d) execute such powers-of-attorney transfers and instruments, and
- (e) generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors as may be required by the official assignee or special manager or may be prescribed or be directed by the Court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the official assignee or special manager, or any creditor or person interested

(3) The insolvent shall aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors

(4) If the insolvent wilfully fails to perform the duties imposed upon him by this section or to deliver up possession to the official assignee of any part of his property, which is divisible amongst his creditors

ceding the meeting, and any such assent or dissent shall have effect as if the creditor had been present and had voted at the meeting

29. (1) The insolvent or the official assignee may after the proposal is accepted by the creditors apply to the Court to approve it, and notice of the time appointed for hearing the application shall be given to

Approval of proposal
by Court

each creditor who has proved

(2) Except where an estate is being summarily administered or special leave of the Court has been obtained, the application shall not be heard until after the conclusion of the public examination of the insolvent. Any creditor who has proved may be heard by the Court in opposition to the application notwithstanding that he may at a meeting of creditors have voted for the acceptance of the proposal.

(3) The Court shall before approving the proposal hear a report of the official assignee as to the terms thereof and as to the conduct of the insolvent and any objections which may be made by or on behalf of any creditor.

(4) Where the Court is of opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors or in any case in which the Court is required to refuse the insolvent's discharge, the Court shall refuse to approve the proposal.

(5) Where any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge, the Court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than four annas in the rupee on all the unsecured debts provable against the debtor's estate.

(6) No composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent.

(7) In any other case the Court may either approve or refuse to approve the proposal.

30. (1) If the Court approves the proposal, the terms shall be embodied in an order of the Court and an order shall be made annulling the adjudication, and the provisions of section 23 sub-

Order on approval

sections (1) and (3) shall thereupon apply, and the composition or scheme shall be binding on all the creditors so far as relates to any debt due to them from the insolvent and provable in insolvency.

(2) The provisions of the composition or scheme may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court.

31. (1) If default is made in the payment of any instalment due in pursuance of any composition or scheme

Power to re-adjudge
debtor insolvent

approved as aforesaid, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay or

that the approval of the Court was obtained by fraud the Court may if it thinks fit on application by any person interested re-adjudge the debtor insolvent and annul the composition or scheme and the property of the debtor shall thereupon vest in the official assignee but without prejudice to the validity of any transfer or payment duly made or of anything duly done under or in pursuance of the composition or scheme.

(2) Where a debtor is re-adjudged insolvent under sub-section (1), all debts provable in other respects which have been contracted before the date of such re-adjudication shall be provable in the insolvency.

32. Notwithstanding the acceptance and approval of a composition or scheme the composition or scheme shall

Limitation of effect of composition or scheme not be binding on any creditor so far as regards a debt or liability from which under the provisions of this Act the insolvent would not be discharged by an order of discharge in insolvency unless the creditor assents to the composition or scheme.

Control over person and property of insolvent

33. (1) Every insolvent shall unless prevented by sickness or other sufficient cause attend any meeting of

Duties of insolvent as to discovery and realization of property his creditors which the official assignee may require him to attend and shall submit, to such examination and give such information as the meeting may require.

(2) The insolvent shall

(a) give such inventory of his property, such list of his creditors and debtors and of the debts due to and from them respectively

(b) submit to such examination in respect of his property or his creditors

(c) wait at such times and places on the official assignee or special manager

(d) execute such powers-of-attorney transfers and instruments, and

(e) generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors,

as may be required by the official assignee or special manager or may be prescribed or be directed by the Court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the official assignee or special manager, or any creditor or person interested.

(3) The insolvent shall aid, to the utmost of his power, in the realization of his property and the distribution of the proceeds among his creditors.

(4) If the insolvent wilfully fails to perform the duties imposed upon him by this section or to deliver up possession to the official assignee of any part of his property, which is divisible amongst his creditors under

this Act and which is for the time being in his possession or under his control, he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of Court, and may be punished accordingly

34. (1) The Court may, either of its own motion or at the instance of the official assignee or of any creditor, by warrant addressed to any police-officer or prescribed officer of the Court, cause an insolvent to be arrested, and committed to the civil prison or if in prison to be detained until such time as the Court may order, under the following circumstances, namely —

(a) if it appears to the Court that there is probable reason for believing that he has absconded or is about to abscond with a view of avoiding examination in respect of his affairs, or of otherwise avoiding, delaying or embarrassing proceedings in insolvency against him, or

(b) if it appears to the Court that there is probable reason for believing that he is about to remove his property with a view of preventing or delaying possession being taken of it by the official assignee, or that there is probable reason for believing that he has concealed or is about to conceal or destroy any of his property or any books, documents or writings which might be of use to his creditors in the course of his insolvency, or

(c) if he removes any property in his possession above the value of fifty rupees without the leave of the official assignee

(2) No payment or composition made or security given after arrest made under this section shall be exempt from the provisions of this Act relating to fraudulent preferences

35. Where the official assignee has been appointed interim receiver or an order of adjudication is made, the Court, on the application of the official assignee, may from time to time, order that for such time not exceeding three months, as the Court thinks fit, all post letters whether registered or unregistered, parcels and money orders addressed to the debtor at any place or places mentioned in the order for redirection shall be re-directed or delivered by the Postal authorities in British India, to the official assignee, or otherwise as the Court directs, and the same shall be done accordingly

36. (1) The Court may, on the application of the official assignee or of any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in such manner as may be prescribed the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent, or any person whom the Court may deem capable of giving information respecting

the insolvent, his dealings or property and the Court may require any such person to produce any documents in his custody or power relating to the insolvent, his dealings or property.

(2) If any person so summoned after having been tendered a reasonable sum refuses to come before the Court at the time appointed or refuses to produce any such document having no lawful impediment made known to the Court at the time of its sitting and allowed by it the Court may by warrant cause him to be apprehended and brought up for examination.

(3) The Court may examine any person so brought before it concerning the insolvent his dealing or property and such person may be represented by a legal practitioner.

(4) [If on his examination any such person admits] that he is indebted to the insolvent the Court may on the application of the official assignee order him to pay to the official assignee at such time and in such manner as to the Court seems expedient the amount in which he is indebted or any part thereof either in full discharge of the whole amount or not as the Court thinks fit with or without costs of the examination.

(5) ²[If on his examination any such person admits] that he has in his possession any property belonging to the insolvent the Court may on the application of the official assignee order him to deliver to the official assignee that property or any part thereof at such time in such manner and on such terms as to the Court may seem just.

(6) Orders made under sub-sections (4) and (5) shall be executed in the same manner as decrees for the payment of money or for the delivery of property under the Code of Civil Procedure 1908 respectively.

(7) Any person making any payment or delivery in pursuance of an order made under sub-section (4) or sub-section (5) shall by such payment or delivery be discharged from all liability whatsoever in respect of such debt or property.

37 The Court shall have the same powers to issue commissions and letters of request for the examination on commission or otherwise of any person liable to examination under section 36 as it has for the examination of witnesses under the Code of Civil Procedure 1908.

Power to issue commissions

Discharge of Insolvent

38. (1) An insolvent may at any time after the order of adjudication apply to the Court for an order of discharge and the Court shall appoint a day for hearing the application but, save where

Discharge of insolvent

¹ These words were substituted for the words "if on the examination of any such person the Court is satisfied" by the Presidency towns Insolvency (Amendment) Act 1927 (XIX of 1927).

² These words were substituted for the words "if on the examination of any such person the Court is satisfied" by the Presidency towns Insolvency (Amendment) Act 1927 (XIX of 1927).

the public examination of the insolvent has been dispensed with under the provisions of this Act, the application shall not be heard until after such examination has been concluded. The application shall be heard in open Court.

(2) On the hearing of the application, the Court shall take into consideration any report of the official assignee as to the insolvent's conduct and affairs and, subject to the provisions of section 39, may—

- (a) grant or refuse an absolute order of discharge, or
- (b) suspend the operation of the order for a specified time, or
- (c) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property.

39. (1) The Court shall refuse the discharge in all cases where the insolvent has committed any offence under this Act, or under sections 421 to 424 of the Indian Penal Code, and shall, on proof of any of the facts hereinafter mentioned, either—

Cases in which the Court must refuse an absolute discharge

- (a) refuse the discharge, or
- (b) suspend the discharge for a specified time, or
- (c) suspend the discharge until a dividend of not less than four annas in the rupee has been paid to the creditors, or
- (d) require the insolvent as a condition of his discharge to consent to a decree being passed against him in favour of the official assignee for any balance or part of any balance of the debts provable under the insolvency which is not satisfied at the date of his discharge, such balance or part of any balance of the debts to be paid out of the future earnings or after-acquired property of the insolvent in such manner and subject to such conditions as the Court may direct, but in that case the decree shall not be executed without leave of the Court, which leave may be given on proof that the insolvent since his discharge acquired property or income available for payment of his debts.

(2) The facts hereinbefore referred to are—

- (a) that the insolvent's assets are not of a value equal to four annas in the rupee on the amount of his unsecured liabilities, unless he satisfies the Court that the fact that the assets are not of such value has arisen from circumstances for which he cannot justly be held responsible,
- (b) that the insolvent has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency.

- (c) that the insolvent has continued to trade after knowing himself to be insolvent
- (d) that the insolvent has contracted any debt provable under this Act without having at the time of contracting it any reasonable or probable ground of expectation (the burden of proving which shall lie on him) that he would be able to pay it
- ✓ (e) that the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities,
- (f) that the insolvent has brought on or contributed to his insolvency by rash or hazardous speculations or by unjustifiable extravagance in living or by gambling or by culpable neglect of his business affairs,
- (g) that the insolvent has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any suit properly brought against him
- (h) that the insolvent has within three months preceding the time of presentation of the petition incurred unjustifiable expense by bringing a frivolous or vexatious suit,
- (i) that the insolvent has within three months preceding the date of the presentation of the petition when unable to pay his debts as they become due given an undue preference to any of his creditors
- (j) that the insolvent has concealed or removed his books or his property or any part thereof or has been guilty of any other fraud or fraudulent breach of trust

(3) The power of suspending and of attaching conditions to an insolvent's discharge may be exercised concurrently

(4) On any application for discharge the report of the official assignee shall be *prima facie* evidence and the Court may presume the correctness of any statement contained therein

40. Notice of the appointment by the Court of the day for hearing the application for discharge shall be published in the prescribed manner and sent one month at least before the day so appointed to each creditor who has proved and the Court may hear the official assignee and may also hear any creditor. At the hearing the Court may put such questions to the insolvent and receive such evidence as it may think fit

41. If an insolvent does not appear on the day so appointed for hearing his application for discharge or if an insolvent shall not apply to the Court for an order of discharge within such time as may be prescribed the Court on the application of the official assignee or of a creditor or of its own motion may annul the adjudication or make such other order as

Hearing of application for discharge

Power to annul adjudication on failure to apply for discharge

it may think fit, and the provisions of section 23 shall apply on such annulment

42. (1) Where the Court refuses the discharge of the insolvent it may, after such time and in such circumstances as may be prescribed, permit him to renew his application

Renewal of application and variation of terms of order

(2) Where an order of discharge is made subject to conditions and at any time after the expiration of two years from the date of the order the insolvent shall satisfy the Court that there is no reasonable probability of his being in a position to comply with the terms of such order, the Court may modify the terms of the order, or of any substituted order, in such manner and upon such conditions as it may think fit

43. A discharged insolvent shall, notwithstanding his discharge give such assistance as the official assignee may require in the realization and distribution of such of his property as is vested in the official assignee, and, if he fails to do so shall be guilty of a contempt of Court, and the Court may also if it thinks fit, revoke his discharge, but without prejudice to the validity of any sale, disposition or payment duly made or thing duly done subsequent to the discharge, but before its revocation

Duty of discharged insolvent to assist in realization of property

44. In either of the following cases this is to say —

- Fraudulent settlements
- (1) in the case of a settlement made before and in consideration of marriage where the settlor is not at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, or
 - (2) in the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife) .
- if the settlor is adjudged insolvent or compounds or arranges with his creditors and it appears to the Court that the settlement, covenant or contract was made in order to defeat or delay creditors, or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made, the Court may refuse or suspend an order of discharge or grant an order subject to conditions or refuse to approve a composition or arrangement

Effect of order of discharge

45. (1) An order of discharge shall not release the insolvent from—

- (a) any debt due to the Crown;
- (b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party or
- (c) any debt or liability in respect of which he has obtained the benefit by any fraud to which he was a party or

(d) any liability under an order for maintenance made under section 488 of the Code of Criminal Procedure, 1898

(2) Save as otherwise provided by sub section (1), an order of discharge shall release the insolvent from all debts provable in insolvency

(c) An order of discharge shall be conclusive evidence of the insolvency and of the validity of the proceedings therein

(4) An order of discharge shall not release any person who at the date of the presentation of the petition was a partner or co-trustee with the insolvent or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him

PART III.

ADMINISTRATION OF PROPERTY

Proof of debts

46 (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or breach of trust shall not be provable in insolvency

(2) A person having notice of the presentation of any insolvency petition by or against the debtor shall not prove for any debt or liability contracted by the debtor subsequently to the date of his so having notice

(3) Save as provided by sub sections (1) and (2), all debts and liabilities present or future certain or contingent to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication shall be deemed to be debts provable in insolvency

(4) An estimate shall be made by the official assignee of the value of any debt or liability provable as aforesaid which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value

Provided that if in his opinion the value of the debt or liability is incapable of being fairly estimated he shall issue a certificate to that effect and thereupon the debt or liability shall be deemed to be a debt not provable in insolvency

Explanation—For the purposes of this section "liability" includes any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur or is or is not likely to occur or capable of occurring, before the discharge of the debtor, and generally it includes

any express or implied engagement, agreement or undertaking to, or capable of resulting in the payment of, money, or moneys not whether the payment is, as respects amount, fixed or unliquidated or as respects time, present or future, certain or dependent on any contingency or contingencies, as to mode of valuation, capable of being ascertained by fixed rules, or as matter of opinion

47. Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings and the sum due from the one party shall be set-off against any sum due from the other party, and the balance of the account, and no more shall be claimed or paid on either side respectively

Provided that a person shall not be entitled under this section to claim the benefits of any set-off against the property of an insolvent in any case where he had at the time of giving credit to the insolvent notice of the presentation of any insolvency petition by or against him.

48. With respect to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs, and the other matters referred to in the Second Schedule the rules in that schedule shall be observed

49. (1) In the distribution of the property of the insolvent there shall be paid in priority to all other debts—

- (a) all debts due to the Crown or to any local authority,
- (b) all salary or wages of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation for the person not exceeding three hundred rupees for each such clerk and one hundred rupees for each such servant or labourer, and
- (c) rent due to a landlord from the insolvent provided the amount payable under this clause shall not exceed one month's rent.

(2) The debts specified in sub section (1) shall rank equally between themselves, and shall be paid in full, unless the property of the insolvent is insufficient to meet them in which case they shall abate in equal proportions between themselves

(3) Subject to the retention of such sums as may be necessary for the expenses of administration or otherwise the debts specified in sub section (1) shall be discharged forthwith in so far as the property of the insolvent is sufficient to meet them

(4) In the case of partners the partnership property shall be applicable in the first instance in payment of the partnership debts and the separate property of each partner shall be applicable in the first instance in payment of his separate debts Where there is a surplus of the

separate property of the partners it shall be dealt with as part of the partnership property and where there is a surplus of the partnership property, it shall be dealt with as part of the respective separate property in proportion to the rights and interests of each partner in the partnership property.

(5) Subject to the provisions of this Act, all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference

(6) Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per centum per annum on all debts proved in the insolvency

50. After an order of adjudication has been made no distress for rent due before such order shall be made upon the goods or effects of the insolvent, unless the order be annulled, but the landlord or party to whom the rent may be due shall be entitled to prove in respect of such rent

Property available for payment of debts

51. The insolvency of a debtor whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to and to commence at—

- (a) the time of the commission of the act of insolvency on which an order of adjudication is made against him, or
- (b) if the insolvent is proved to have committed more acts of insolvency than one the time of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition

Provided that no insolvency petition or order of adjudication shall be rendered invalid by reason of any act of insolvency committed anterior to the debt of the petitioning creditor

52. (1) The property of the insolvent divisible amongst his creditors, and in this Act referred to as the property of the insolvent, shall not comprise the following particulars, namely —

- (a) property held by the insolvent on trust for any other person,
- (b) the tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessels, and furniture of himself, his wife and children, to a value, inclusive of tools and apparel and other necessaries as aforesaid, not exceeding three hundred rupees in the whole

(2) Subject as aforesaid, the property of the insolvent shall consist of the following particulars, namely —

- (a) all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him before his discharge,
- (b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as he has or may have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge, and
- (c) all goods being at the commencement of the insolvency in the possession, order or disposition of the insolvent in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof

Provided that things in action other than debts due or growing due to the insolvent in the course of his trade or business shall not be deemed goods within the meaning of clause (c)

Provided also that the true owner of any goods which have become divisible among the creditors of the insolvent under the provisions of clause (c) may prove for the value of such goods

Effect of insolvency on antecedent transactions

53 (1) Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the

Restriction of rights of creditor under execution benefit of the execution against the official assignee, except in respect of assets realized in the course of the execution by sale or otherwise before the date of the order of adjudication and before he had notice of the presentation of any insolvency petition by or against the debtor

(2) Nothing in this section shall affect the right of a secured creditor in respect of property against which a decree is executed

(3) A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to the property against the official assignee

54. Where execution of a decree has issued against any part of the property of a debtor which is saleable in execution

Duties of Court executing decree as to property taken in execution and before the sale thereof notice is given to the Court executing the decree that an order of adjudication has been made against the debtor, the Court shall

cause the property to be sold and the proceeds of the sale to be applied in satisfaction of the decree and to pay an adequate part thereof for the payment of the debts of the debtor

55. Any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall if the transferor is adjudged insolvent within two years after the date of the transfer be void against the official assignee

Avoidance of voluntary transfer

56. (1) Every transfer of property, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall if such person is adjudged insolvent on a petition presented within three months after the date thereof be deemed fraudulent and void as against the official assignee

Avoidance of preference in certain cases

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the insolvent

57. Subject to the foregoing provisions with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences nothing in this Act shall invalidate in the case of an insolvency—

Protection of bona fide transactions

- (a) any payment by the insolvent to any of his creditors,
- (b) any payment or delivery to the insolvent,
- (c) any transfer by the insolvent for valuable consideration, or
- (d) any contract or dealing by or with the insolvent for valuable consideration

Provided that any such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor

Realization of property

58. (1) The official assignee shall as soon as may be, take possession of the deeds, books and documents of the insolvent and all other parts of his property capable of manual delivery

Possession of property by official assignee

(2) The official assignee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent, be in the same position as if he were a receiver of the property appointed under the Code of Civil Procedure, 1908, and the Court may on his application enforce such acquisition or retention accordingly

(3) Where any part of the property of the insolvent consists of shares in ships, shares, or any other property transferable in the books of any company, office or person, the official assignee may exercise the right to transfer the property to the same extent as the insolvent might have exercised it, if he had not become insolvent.

(4) Where any part of the property of the insolvent consists of things in action, such things shall be deemed to have been duly transferred to the official assignee.

(5) Any treasurer or other officer, or any banker, attorney or agent of an insolvent, shall pay and deliver to the official assignee all moneys and securities in his possession or power as such officer, banker or agent, which he is not by law entitled to retain as against the insolvent or the official assignee. If he fails so to do, he shall be guilty of a contempt of Court, and shall be punishable accordingly on the application of the official assignee.

59. (1) The Court may grant a warrant to any prescribed officer

of the Court or any police-officer above the rank of a constable to seize any part of the property of an insolvent in the custody or possession of the insolvent or of any other

person, and with a view to such seizure to break open any house, building or room of the insolvent where the insolvent is supposed to be or any building or receptacle of the insolvent where any of his property is supposed to be.

(2) Where the Court is satisfied that there is reason to believe that property of the insolvent is concealed in a house or place not belonging to him, the Court may, if it thinks fit, grant a search warrant to any such officer as aforesaid who may execute it according to its tenor.

60. (1) Where an insolvent is an officer of the Army or Navy or

or of His Majesty's Royal Indian Marine

Service, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the official assignee shall receive for distribution amongst the creditors so much

of the insolvent's pay or salary liable to attachment in execution of a decree as the Court may direct.

(2) Where an insolvent is in the receipt of a salary or income other than as aforesaid, the Court may, at any time after adjudication and from time to time, make such order as it thinks just for the payment to the official assignee for distribution among the creditors of so much of such salary or income as may be liable to attachment in execution of a decree or of any portion thereof.

61. The property of the insolvent

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Vesting and transfer of
property

(3) Where any part of the property of the insolvent consists of shares in ships, shares, or any other property transferable in the books of any company, office or person, the official assignee may exercise the right to transfer the property to the same extent as the insolvent might have exercised it, if he had not become insolvent.

(4) Where any part of the property of the insolvent consists of real estate in action, such things shall be deemed to have been duly transferred to the official assignee.

(5) Any treasurer or other officer, or any banker, attorney or agent of an insolvent, shall pay and deliver to the official assignee all moneys and securities in his possession or power as such officer, banker or agent, which he is not by law entitled to retain as against the insolvent or the official assignee. If he fails so to do, he shall be guilty of contempt of Court, and shall be punishable accordingly on the application of the official assignee.

59. (1) The Court may grant a warrant to any prescribed officer of the Court or any police-officer above the rank of a constable to seize any part of the property of an insolvent in the custody or possession of the insolvent or of any other person, and with a view to such seizure to break open any house, building or room of the insolvent where the insolvent is supposed to be or any building or receptacle of the insolvent where any of his property is supposed to be.

(2) Where the Court is satisfied that there is reason to believe that any property of the insolvent is concealed in a house or place not belonging to him, the Court may, if it thinks fit, grant a search warrant to any such officer as aforesaid who may execute it according to its tenor.

60. (1) Where an insolvent is an officer of the Army or Navy or of His Majesty's Royal Indian Marine Service, or an officer or clerk or others employed or engaged in the civil service of the Crown, the official assignee shall receive for distribution amongst the creditors so much of the insolvent's pay or salary liable to attachment in execution of a decree as the Court may direct.

(2) Where an insolvent is in the receipt of a salary or income less than as aforesaid, the Court may, at any time after adjudication and from time to time make such order as it thinks just for the payment to the official assignee for distribution among the creditors of so much of the salary or income as may be liable to attachment in execution of a decree or of any portion thereof.

61 The property of the insolvent shall pass from the official assignee to the official assignee and shall vest in the official assignee for the time being during his continuance in office, without any transfer whatever.

Vesting and transfer of property

62. (1) Where any part of the property of an insolvent consists of land of any tenure burdened with onerous covenants, of shares or stocks in companies, of unprofitable contracts or of any other property that is unsaleable, or not readily saleable,

Disclaimer of onerous property

by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the official assignee may notwithstanding that he may have endeavoured to sell or have taken possession of the property or exercised any act of ownership in relation thereto but subject always to the provisions hereinafter contained in that behalf by writing signed by him at any time within twelve months after the insolvent has been adjudged insolvent, disclaim the property

Provided that where any such property has not come to the knowledge of the official assignee within one month after such adjudication as aforesaid, he may disclaim the property at any time within twelve months after he has first become aware thereof

(2) The disclaimer shall operate to determine, as from the date thereof, the rights, interest and liabilities of the insolvent and his property in or in respect of the property disclaimed and shall also discharge the official assignee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the insolvent and his property and the official assignee from liability, affect the rights or liabilities of any other person

63. Subject always to such rules as may be made in this behalf, the official assignee shall not be entitled to disclaim any leasehold interest without the leave of the Court, and the Court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements and other matters arising out of the tenancy, as the Court thinks just

64. The official assignee shall not be entitled to disclaim any property in pursuance of section 62 in any case where an application in writing has been made to the official assignee by any person interested in the property requiring him to decide whether he will disclaim, and the official assignee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice that he disclaims the property, and in the case of a contract, if the official assignee, after such application as aforesaid, does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it

Power to call on official assignee to disclaim

65. The Court may, on the application of any person who
against the official assignee, entitled

Power for Court to rescind contract benefit or subject to the burden of a contract made with the insolvent, make an order rescinding the contract on such terms as may be ordered by or to either party of damages for the non performance of the contract, or otherwise, as to the Court may seem equitable, and damages payable under the order to any such person may be by him as a debt under the insolvency

66. (1) The Court may, on the application of any person claiming any interest in any disclaimed property, or under any liability not disclosed by this Act in respect of any disclaimed property and on hearing such persons as the Court thinks fit, make an order for the vesting of the property in or delivery thereof to

Power for Court to make vesting order in respect of disclaimed property person entitled thereto or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid trustee for him, and on such terms as the Court thinks just and any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without transfer for the purpose

Provided always that where the property disclaimed is of a leasehold nature the Court shall not make a vesting order in favour of any person claiming under the insolvent, whether as under lessee or as mortgagor, except upon the terms of making such person subject to the liabilities and obligations as the insolvent was subject to under the lease in respect of the property at the date when the insolvency petition was filed and any under-lessee or mortgagee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there is no person claiming under the insolvent who is willing to accept an order upon such terms, the Court shall have power to vest the insolvent's interest in the property in any person either personally or in a representative character, and either alone or jointly with the insolvent, to perform the lessee's covenants in such lease and be freed and discharged from all estates, incumbrances and interests created therein by the insolvent

(2) The Court may, if it thinks fit, modify the terms prescribed in the foregoing proviso so as to make a person in whose behalf the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the insolvency petition was filed and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order

67. Any person injured by the operation of a disclaimer under the foregoing provisions shall be deemed to be a creditor of the insolvent to the amount of the injury, and may accordingly prove the same as a debt under the insolvency

Persons injured by disclaimer may prove

68. (1) Subject to the provisions of this Act, the official assignee shall, with all convenient speed, realize the property of the insolvent, and for that purpose may—

- (a) sell all or any part of the property of the insolvent,
 - (b) give receipts for any money received by him,
- and may by leave of the Court do all or any of the following things, namely—
- (c) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same
 - (d) institute defend or continue any suit or other legal proceeding relating to the property of the insolvent
 - (e) employ a legal practitioner or other agent to take any proceedings or do any business which may be sanctioned by the Court
 - (f) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time or fully paid shares debentures or debenture stock in any limited company subject to such stipulations as to security and otherwise as the Court thinks fit
 - (g) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts or for the purpose of carrying on the business,
 - (h) refer any dispute to arbitration and compromise all debts, claims and liabilities, on such terms as may be agreed upon,
 - (i) divide in its existing form amongst the creditors, according to its estimated value any property which, from its peculiar nature or other special circumstances cannot readily or advantageously be sold

(2) The official assignee shall account to the Court and pay over all monies and deal with all securities in such manner as is prescribed or as the Court directs

Distribution of property

69. (1) The official assignee shall with all convenient speed, declare and distribute dividends amongst the creditors who have proved their debts

(2) The first dividend (if any) shall be declared and be distributed within one year* after the adjudication unless the official assignee satisfies the Court that there is sufficient reason for postponing the declaration to a later date

* The words one year have been substituted for the words six months by Act III of 1929 which received the assent of the G. G. on 22nd March 1929

(3) Subsequent dividends shall, in the absence of sufficient reason to the contrary, be declared and be payable at intervals of not more than six months

(4) Before declaring a dividend, the official assignee shall cause notice of his intention to do so to be published in the prescribed manner; he shall also send reasonable notice thereof to each creditor mentioned in the insolvent's schedule who has not proved his debt

(5) When the official assignee has declared a dividend, he shall send to each creditor who has proved a notice showing the amount of the dividend, and when and how it is payable, and, if required by any creditor, a statement in the prescribed form as to the particulars of the estate.

70. Where one partner in a firm is adjudged insolvent a creditor to whom the insolvent is indebted jointly with the other partners in the firm or any of them shall not receive any dividend out of the separate property of the insolvent until all the separate creditors have received the full amount of their respective debts.

71. (1) In the calculation and distribution of dividends, the official assignee shall retain in his hands sufficient assets to meet—

- (a) debts provable in insolvency and appearing from the insolvent's statements or otherwise to be due to persons resident in places so distant that in the ordinary course of communication they have not had sufficient time to tender their proofs,
- (b) debts provable in insolvency the subject of claims not yet determined,
- (c) disputed proofs or claims, and
- (d) the expenses necessary for the administration of the estate or otherwise

(2) Subject to the provisions of sub-section (1), all money in hand shall be distributed as dividends

72 Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the official assignee any dividend or dividends which he may have failed to receive, before that money is applied to the payment of any future dividend or dividends but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein

73. (1) When the official assignee has realized all the property of the insolvent, or so much thereof as can, in his opinion, be realized without needlessly protracting the proceedings in insolvency, he shall with the leave of the Court, declare a final dividend, but before so doing he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified to him but not proved and if they do not prove their claims, to the satisfaction of the Court within

the time limited by the notice, he will proceed to make a final dividend without regard to their claims

(2) After the expiration of the time so limited or, if the Court on application by any such claimant grants him further time for establishing his claim, then on the expiration of that further time, the property of the insolvent shall be divided among the creditors who have proved their debts, without regard to the claims of any other persons

74. No suit for a dividend shall lie against the official assignee, but, where the official assignee refuses to pay any dividend the Court may, on the application of the creditor who is aggrieved by such refusal, order him to pay it and also to pay out of his own money interest thereon at such rate as may be prescribed for the time that it is withheld, and the costs of the application

75. (1) Subject to such conditions and limitations as may be prescribed the official assignee may appoint the insolvent himself to superintend the management of the property of the insolvent or of any part thereof or to carry on the trade (if any) of the insolvent for the benefit of his creditors and in any other respect to aid in administering the property in such manner and on such terms as the official assignee may direct

(2) Subject as aforesaid the Court may from time to time make such allowance as it thinks just to the insolvent out of his property for the support of the insolvent and his family or in consideration of his services if he is engaged in winding up his estate but any such allowance may at any time be varied or determined by the Court

76. The insolvent shall be entitled to any surplus remaining after payment in full of his creditors with interest, as provided by this Act and of the expenses of the proceedings taken thereunder

PART IV

OFFICIAL ASSIGNEES

77. (1) The Chief Justice of each of the High Courts of Judicature at Fort William Madras ¹[Bombay and Rangoon and the ²Judicial Commissioner of Sind] may from time to time appoint sub-

¹ These words were substituted for the words "and Bombay and the Chief Judge of the Chief Court of Lower Burma" by the Insolvency (Amendment) Act 1926 (IX of 1926)

² The words "Chief Judge of the Chief Court of Sind" are to be substituted for the words "Judicial Commissioner of Sind" when the Sind Courts (Supplementary) Act 1926 (XXXIV of 1926) comes into force

(b) to make such other reports concerning the conduct of the insolvent as the Court may direct or as may be prescribed, and

(c) to take such part and give such assistance in relation to the prosecution of any fraudulent insolvent as the Court may direct or as may be prescribed

80. The official assignee shall, whenever required by any creditor so to do and on payment by the creditor of the prescribed fee, furnish and send to the creditor by post a list of the creditors showing in the list the amount of the debt due to each of the creditors

Duty to furnish list of creditors

81. (1) Such remuneration shall be paid to the official assignee as may be prescribed

Remuneration

(2) No remuneration whatever beyond that referred to in subsection (1) shall be received by an official assignee as such

82. The Court shall call the official assignee to account for any misfeasance, neglect or omission which may appear in his accounts or otherwise and may require the official assignee to make good any

Misfeasance

loss which the estate of the insolvent may have sustained by reason of the misfeasance, neglect or omission

83. The official assignee may sue and be sued by the name of 'the official assignee of the property of

Name under which to sue or be sued an insolvent inserting the name of the insolvent and by that name may hold property of every description make contracts, enter into any engagements binding on himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office

84. If an order of adjudication is made against an official assignee he shall thereby vacate the office of official assignee

Office vacated by insolvency

85. (1) Subject to the provisions of this Act and to the directions of the Court the official assignee shall in the administration of the property of the insolvent and in the distribution thereof among his creditors have regard to any resolution that may be passed by the creditors at a meeting

Discretionary powers and control thereof

(2) The official assignee may from time to time summon meetings of the creditors for the purpose of ascertaining their wishes and it shall be his duty to summon meetings at such times as the creditors by resolution at any meeting or the Court may direct or whenever requested in writing to do so by one fourth in value of the creditors who have proved

(3) The official assignee may apply to the Court for directions in relation to any particular matter arising under the insolvency

(4) Subject to the provisions of this Act, the official assignee shall use his own discretion in the management of the estate and its distribution among the creditors

86. If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the official assignee, he may appeal to the Court and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just.

87. (1) If any official assignee does not faithfully perform his duties and duly observe all the requirements imposed on him by any enactment, rules or otherwise, with respect to the performance of his duties, or if any complaint is made to the Court by any creditor in regard thereto, the Court shall enquire into the matter and take such action thereon as may be deemed expedient.

(2) The Court may at any time require any official assignee to answer any enquiry made by it in relation to any insolvency in which he is engaged, and may examine him or any other person on oath concerning the insolvency

(3) The Court may also direct an investigation to be made of the books and vouchers of the official assignee

PART V

COMMITTEE OF INSPECTION

88. The Court may, if it so thinks fit, authorize the creditors who have proved to appoint from among the creditors or holders of general proxies or general powers-of attorney from such creditors, a committee of inspection for the purpose of superintending the administration of the insolvent's property by the official assignee

Provided that a creditor, who is appointed a member of a committee of inspection, shall not be qualified to act until he has proved

Control of committee of inspection over official assignee

89 The committee shall have such powers of control over the proceedings of the official assignee as may be prescribed

PART VI

PROCEDURE

90. (1) In proceedings under this Act the Court shall have the like powers and follow the like procedure as Powers of the Court it has and follows in the exercise of its ordinary original civil jurisdiction.

Provided that nothing in this sub section shall in any way limit the jurisdiction conferred on the Court under this Act

(2) Subject to the provisions of this Act and rules, the costs of and incidental to any proceeding in the Court shall be in the discretion of the Court

(3) The Court may at any time adjourn any proceedings before it upon such terms if any as it thinks fit to impose

(4) The Court may at any time amend any written process or proceeding under this Act upon such terms, if any, as it thinks fit to impose

(5) Where by this Act or by rules the time for doing any act or thing is limited, the Court may extend the time either before or after the expiration thereof, upon such terms, if any, as the Court thinks fit to impose

(6) Subject to rules, the Court may in any matter take the whole or any part of the evidence either *visà voce* or by interrogatories, or upon affidavit, or by commission

(7) For the purpose of approving a composition or scheme by joint debtors the Court may, if it thinks fit, and on the report of the official assignee that it is expedient so to do, dispense with the public examination of one of the joint debtors if he is unavoidably prevented from attending the examination by illness or absence abroad

(8) For the purpose of this Act the¹ [Court of the Judicial Commissioner of Sind] shall have all the powers to punish for contempt of Court which are possessed by the High Courts of Judicature at Fort William Madras and Bombay respectively

91. Where two or more insolvency petitions are presented against the same debtor or against joint debtors, or where joint debtors file separate petitions, the Court may consolidate the proceedings or any of them on such terms as the Court thinks fit

¹ These words were substituted for the words 'Chief Court of Lower Burma' by s. 8 of the Insolvency (Amendment) Act 1926 (IX of 1926) and the words 'Chief Court of Sind' are to be substituted for the words 'Court of the Judicial Commissioner of Sind' when the Sind Court (Supplementary) Act 1926 (XXXIV of 1926) comes in force.

92. Where the petitioner does not proceed with due diligence his petition, the Court may substitute the petitioner any other creditor to whom the debtor is indebted in the amount required by this Act in the case of a petitioning creditor.

Power to charge carriage of petition

93. If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in that matter shall, unless the Court otherwise orders, be continued as if he were alive.

Continuance of proceedings on death of debtor

94. The Court may, at any time, for sufficient reason make an order staying the proceedings under an insolvency petition, either altogether or for a limited time, on such terms and subject to such conditions as the Court thinks just.

Power to stay proceedings

95. Any creditor whose debt is sufficient to entitle him to present an insolvency petition against all the partners in a firm may present a petition against one or more partners in the firm without including the others.

Power to present petition against a partner

96. Where there are more respondents than one to a petition, the Court may dismiss the petition as to one or more of them without prejudice to the effect of the petition as against the other or others of them.

Power to dismiss petition against some respondents only

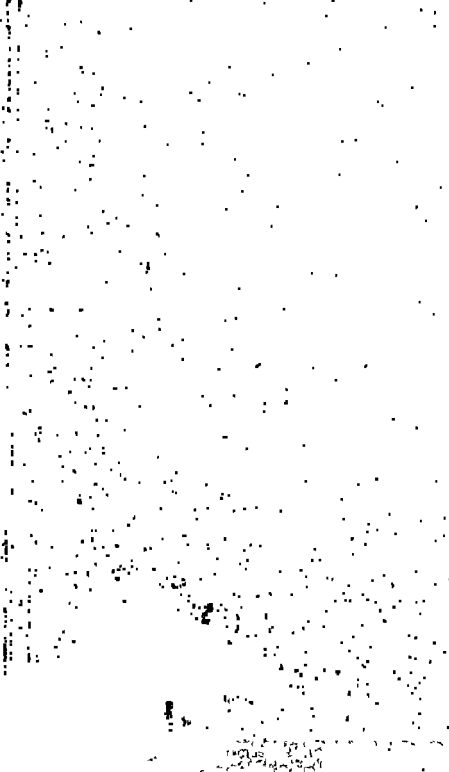
97. Where an order of adjudication has been made on an insolvency petition against or by one partner in a firm, no other insolvency petition against or by a partner in the same firm shall be presented to or transferred to the Court in which the first mentioned petition is in course of prosecution, and such Court may give such directions for consolidating the proceedings under the petitions as it thinks just.

Separate insolvency petitions against partners

98. (1) Where a partner in a firm is adjudged insolvent the Court may authorize the official assignee to continue or commence and carry on any suit or other proceeding in his name and that of the insolvent's partner, and any release by the partner of the debt or demand to which the proceeding relates shall be void.

Suits by official assignee and Insolvent's partners

(2) Where application for authority to continue or commence any suit or other proceeding has been made under sub section (1) no objection of the application shall be given to the insolvent's partner and he may show cause against it, and on his application the Court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the proceeding, and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the Court directs.



99. (1) Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm.

Proceedings in partnership name

Provided that in that case the Court may, on application by any person interested, order the names of the persons who are partners in the firm, or the name of the person carrying on business under a partnership name, to be disclosed in such manner and verified on oath or otherwise, as the Court may direct.

(2) In the case of a firm in which one partner is an infant, an adjudication order may be made against the firm other than the infant partner.

100. (1) A warrant of arrest issued by the Court may be executed in the same manner and subject to the same conditions as a warrant of arrest issued under the Code of Criminal Procedure 1898 may be executed.

Warrants of Insolvency Courts

(2) A warrant to seize any part of the property of an insolvent, issued by the Court under section 59 subsection (1) shall be in the form prescribed, and sections 77 (2) 79 82 83 84 and 102 of the said Code shall so far as may be apply to the execution of such warrant.

(3) A search warrant issued by the Court under section 59 subsection (2) may be executed in the same manner and subject to the same conditions as a search warrant for property supposed to be stolen may be executed under the said Code.

PART VII

LIMITATION

101. The period of limitation for an appeal from any act or decision of the official assignee or from an order made by an officer of the Court empowered under section 6 shall be twenty days from the date of such act decision or order as the case may be.

Limitation of appeals

PART VIII

PENALTIES

102. An undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that he is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment.

Undischarged insolvent obtaining credit

92. Where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor is indebted in the amount required by this Act in the case of a petitioning creditor

Power to charge carriage of petition

93. If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall unless the Court otherwise orders be continued as if he were alive

Continuance of proceedings on death of debtor

94. The Court may, at any time for sufficient reason make an order staying the proceedings under an insolvency petition, either altogether or for a limited time, on such terms and subject to such conditions as the Court thinks just

Power to stay proceedings

95. Any creditor whose debt is sufficient to entitle him to present an insolvency petition against all the partners in a firm may present a petition against any one or more partners in the firm without including the others

Power to present petition against a partner

96. Where there are more respondents than one to a petition, the Court may dismiss the petition as to one or more of them without prejudice to the effect of the petition as against the other or others of them

Power to dismiss petition against some respondents only

97. Where an order of adjudication has been made on an insolvency petition against or by one partner in a firm any other insolvency petition against or by a partner in the same firm shall be presented in or transferred to the Court in which the first mentioned petition is in course of prosecution, and such Court may give such directions for consolidating the proceedings under the petitions as it thinks just

Separate insolvency petitions against partners

98. (1) Where a partner in a firm is adjudged insolvent the Court may authorize the official assignee to continue or commence and carry on any suit or other proceeding in his name and that of the insolvent's partner and any release by the partner of the debt or demand to which the proceeding relates shall be void

Suits by official assignee and Insolvent's partners

(2) Where application for authority to continue or commence any suit or other proceeding has been made under sub section (1) notice of the application shall be given to the insolvent's partner and he may show cause against it and on his application the Court may, if it thinks fit direct that he shall receive his proper share of the proceeds of the proceeding and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the Court directs

99. (1) Any two or more persons being partners or any person carrying on business under a partnership name may take proceedings or be proceeded against under this Act in the name of the firm

Proceedings in part
partnership name

Provided that in that case the Court may on application by any person interested order the names of the persons who are partners in the firm or the name of the person carrying on business under a partnership name to be disclosed in such manner and verified on oath or otherwise as the Court may direct

(2) In the case of a firm in which one partner is an infant an adjudication order may be made against the firm other than the infant partner

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Warrants of Insolvency
Courts

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(3) A search warrant issued by the Court under section 59, sub-section (2), may be executed in the same manner and subject to the same conditions as a search warrant for property supposed to be stolen may be executed under the said Code

PART VII

LIMITATION

101. The period of limitation for an appeal from any act or decision of the official assignee or from an order made by an officer of the Court empowered under section 6 shall be twenty days from the date of such act decision or order, as the case may be

Limitation of appeals

PART VIII

PENALTIES

102 An undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that he is undischarged insolvent shall, on conviction by a Magistrate, be punishable with

Undischarged insolvent
obtaining credit

ment for a term which may extend to six months, or with fine, or with both

Punishment of insol-
vents for certain offences

103. Any person adjudged insolvent who—

(a) fraudulently with the intent to conceal the state of his affairs or to defeat the objects of this Act,

(i) has destroyed or otherwise wilfully prevented or purposely withheld the production of any books, paper or writing relating to such of his affairs as are subject to investigation under this Act, or

(ii) has kept or caused to be kept false books, or

(iii) has made false entries in or withheld entries from, or wilfully altered or falsified, any book, paper or writing relating to such of his affairs as are subject to investigation under this Act, or

(b) fraudulently with intent to diminish the sum to be divided amongst his creditors or of giving an undue preference to any of the said creditors,

(i) has discharged or concealed any debt due to or from him, or

(ii) has made away with charged, mortgaged or concealed any part of his property of what kind soever,

shall on conviction be punishable with imprisonment for a term which may extend to two years

Disqualifications of in-
solvent

¹[103A. (1) Where a debtor is adjudged or readjudged insolvent under this Act, he shall, subject to the provisions of this section, be disqualified from—

(a) being appointed or acting as a Magistrate,

(b) being elected to any office of any local authority where the appointment to such office is by election, or holding or exercising any such office to which no salary is attached, and

(c) being elected or sitting or voting as a member of any local authority

(2) The disqualifications which an insolvent is subject to under this section shall be removed, and shall cease if—

(a) the order of adjudication is annulled under sub-section (1) of section 21, or

(b) he obtains from the Court an order of discharge, whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part

(3) The Court may grant or refuse such certificate as it thinks fit]

¹ This section was inserted by s. 2 of the Presidency towns Insolvency (Amendment) Act 1920 (XI of 1920)

Provided that nothing in this section shall permit the modification of the provisions of this Act relating to the discharge of the insolvent

(2) The Court may at any time, if it thinks fit, revoke an order for the summary administration of an insolvent's estate

PART X

SPECIAL PROVISIONS

Exemption of corpo-
ration etc from insol-
vency proceedings

107. No insolvency petition shall be presented against any corporation or against any association or company registered under any enactment for the time being in force

108. (1) Any creditor of a deceased debtor whose debt would have been sufficient to support an insolvency petition against the debtor, had he been alive, may present to the Court within the limits of whose ordinary original civil jurisdiction the debtor resided or carried on business for the greater part of the six months immediately prior to his decease, a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor under this Act

(2) Upon the prescribed notice being given to the legal representative of the deceased debtor the Court may, upon proof of the petitioner's debt unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in insolvency of the deceased debtor's estate, or may upon cause shown dismiss the petition with or without costs

(3) A petition for administration under this section shall not be presented to the Court after proceedings have been commenced in any Court of justice for the administration of the deceased debtor's estate, but that Court may in that case, on proof that the estate is insufficient to pay its debts transfer the proceedings to the Court exercising jurisdiction in insolvency under this Act, and thereupon the last mentioned Court may make an order for the administration of the estate of the deceased debtor and the like consequences shall ensue as under an administration order made on the petition of a creditor

109. (1) Upon an order being made for the administration of a deceased debtor's estate under section 108 the property of the debtor shall vest in the official assignee of the Court, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act

(2) With the modification hereinafter mentioned, all the provisions of Part III relating to the administration of the property of an insolvent,

shall so far as the same are applicable apply to the case of such administration order in like manner as to an order of adjudication under this Act

(3) In the administration of the property of the deceased debtor under an order of administration the official assignee shall have regard to any claims by the legal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate and those claims shall be deemed a preferential debt under the order and be payable in full out of the debtor's estate in priority to all other debts

(4) If on the administration of a deceased debtor's estate any surplus remains in the hands of the official assignee after payment in full of all the debts due from the debtor together with the costs of the administration and interest as provided by this Act in case of insolvency such surplus shall be paid over to the legal representative of the deceased debtor's estate or dealt with in such other manner as may be prescribed

110. (1) After notice of the presentation of a petition under section 108 no payment or transfer of property made by the legal representative shall operate as a discharge to him as between himself and the official assignee

(2) Save as aforesaid nothing in section 108 or section 109 or this section shall invalidate any payment made or act or thing done in good faith by the legal representative or by a District Judge acting under the powers conferred on him by section 64 of the Administrator General's Act 1874 before the date of the order for administration

111. The provisions of sections 108 109 and 110 shall not apply to any case in which probate or letters of administration to the estate of a deceased debtor have been granted to an Administrator General

Saving of jurisdiction
of Administrator General

PART XI

RULES

112 (1) The Courts having jurisdiction under this Act may from time to time make rules¹ for carrying into effect the objects of this Act

Rules

(2) In particular and without prejudice to the generality of the foregoing power such rules may provide for and regulate—

(a) the fees and percentages to be charged under this Act and

¹ For rules by the High Courts see High Court Rules and Orders different provinces

the manner in which the same are to be collected and accounted for and the account to which they are to be paid,

(b) the investment whether separately or collectively, of unclaimed dividends, balances and other sums appertaining to the estates of insolvent debtors whether adjudicated insolvent under this or any former enactment, and the application of the proceeds of such investment,

(c) the proceedings of the official assignee in taking possession of and realising the estates of insolvent debtors

(d) the remuneration of the official assignee

(e) the receipts payments and accounts of the official assignee

(f) the audit of the accounts of the official assignee,

(g) the payment of the remuneration of the official assignee of the costs charges and expenses of his establishment, and of the costs of the audit of his accounts out of the proceeds of the investments in his hands

(h) the payment of the costs incurred in the prosecution of fraudulent debtors and in legal proceedings taken by the official assignee under the direction of the Court out of the proceeds aforesaid

(i) the payment of any civil liability incurred by an official assignee acting under the order or direction of the Court,

(j) the proceedings to be taken in connection with proposals for composition and schemes of arrangement with the creditors of insolvent debtors

(k) the intervention of the official assignee at the hearing of applications and matters relating to insolvent debtors and their estates

[(kk) the giving of lists of creditors and debtors and the affording of assistance to the Court by a petitioning debtor]

(l) the examination by the official assignee of the books and papers of a debtor of undischarged insolvent debtors

(m) the service of notices in proceedings under this Act

(n) the appointment meetings and procedure of committees of inspection

(o) the conduct of proceedings under this Act in the name of a firm

(p) the forms to be used in proceedings under this Act

(q) the procedure to be followed in the case of estates to be administered in a summary manner

(r) the procedure to be followed in the case of estates of deceased persons to be administered under this Act

1 This clause was inserted by s. 3 of the Presidency Towns Insolvency (Amendment) Act 1927 (XIV of 1927).

(s) the distribution of work between the official assignee and his deputy or deputies¹

113 Rules made under the provisions of this Part shall be subject in the case of the High Court of Judicature at Fort William in Bengal to the previous sanction of the Governor General in Council and in the case of any other Court of the Local Government

114. Rules so made and sanctioned shall be published in the Gazette of India or in the local official Gazette as the case may be and shall thereupon have the same force and effect with regard to proceedings under this Act in the Court which made them as if they had been enacted in this Act

PART XII

SUPPLEMENTAL

115 (1) Every transfer mortgage assignment power-of attorney proxy paper certificate affidavit bond or other proceedings instrument or writing whatsoever before or under any order of the Court and any copy thereof shall be exempt from payment of any stamp or other duty whatsoever

Exempt on from duty of transfers etc under this Act

(2) No stamp-duty or fee shall be chargeable for any application made by the official assignee to the Court under this Act or for the drawing and issuing of any order made by the Court on such application

116 (1) A copy of the official Gazette containing any notice inserted in pursuance of this Act shall be evidence of the facts stated in the notice

The Gazette to be evidence

(2) A copy of the official Gazette containing any notice of an order of adjudication shall be conclusive evidence of the order having been duly made and of its date

117 Any affidavit may be used in a Court having jurisdiction under this Act if it is sworn—

Swearing of affidavits

(a) in British India before—

(i) any Court or Magistrate or

(ii) any officer or other person appointed to administer oaths under the Code of Civil Procedure 1908

¹ Cl (s) has been added by Act X of 1930 (which received the G. G. assent on 20th March 1930)

- (b) in England, before any person authorized to administer oaths in His Majesty's High Court of Justice, or in the Court of Chancery of the County Palatine of Lancaster, or before any Registrar of a Bankruptcy Court, or before any officer of a Bankruptcy Court authorized in writing in that behalf by the Judge of the Court or before a Justice of the Peace for the county or place where it is sworn,
- (c) in Scotland or in Ireland, before a Judge Ordinary, Magistrate or Justice of the Peace, and,
- (d) in any other place, before a Magistrate or Justice of the Peace or other person qualified to administer oaths in that place (he being certified to be a Magistrate or Justice of the Peace or qualified as aforesaid, by a British Minister or British Consul or British Political Agent or by a notary public)

118. (1) No proceeding in insolvency shall be invalidated by any formal defect or by any irregularity unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court

(2) No defect or irregularity in the appointment of an official assignee or member of a committee of inspection shall vitiate any act done by him in good faith

119. Where an insolvent is a trustee within the Indian Trustee Act, 1866, section 35 of that Act shall have effect so as to authorize the appointment of a new trustee in substitution for the insolvent (whether voluntarily resigning or not), if it appears expedient to do so, and all provisions of that Act and of any other Act relative thereto, shall have effect accordingly

120. Save as herein provided, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge shall bind the Crown

121. Nothing in this Act, or in any transfer of jurisdiction effected thereby, shall take away or affect any right of audience that any person may have had immediately before the commencement of this Act, or shall be deemed to confer such right in insolvency matters on any person who had not a right of audience before the Courts for the Relief of Insolvent Debtors

122. Where the official assignee has under his control any dividend which has remained unclaimed for fifteen years from the date of declaration or such less period as may be prescribed he shall pay the same to the account and credit of the Government of India unless the Court otherwise directs

Lapse and credit to Government of unclaimed dividends

123. Any person claiming to be entitled to any monies paid to the amount and credit of the Government of India under section 122 may apply to the Court for an order for payment to him of the same and the Court if satisfied that the person claiming is entitled shall make an order for payment to him of the sum due

Claims to monies credited to Government under section 122

Provided that before making an order for the payment of a sum which has been carried to the account and credit of the Government of India the Court shall cause a notice to be served on such officer as the Governor General in Council may appoint in this behalf calling on the officer to show cause within one month from the date of the service of the notice why the order should not be made

124. (1) No person shall as against the official assignee, be entitled to withhold possession of the books of accounts belonging to the insolvent or to set up any lien thereon

Access to insolvent's books

(2) Any creditor of the insolvent may subject to the control of the Court and on payment of such fee, if any, as may be prescribed, inspect at all reasonable times personally or by agent, any such books in the possession of the official assignee

125. Such fees and percentages shall be charged for and in respect of proceedings under this Act as may be prescribed

Fees and percentages

126. All Courts having jurisdiction under this Act shall make such orders and do such things as may be necessary to give effect to section 118 of the Bankruptcy Act, 1883, and to section 50¹ of the Provincial Insolvency Act, 1907

Courts to be auxiliary to each other

127. ²(1) * * * * *

(2) * * * The proceedings under an insolvency petition under the Indian Insolvency Act 1848 pending at the commencement of this Act shall, except so far as any provisions of this Act is

Saving

¹ Now sec 77 of Act V of 1920

² Section 127 sub section (1) and the words Notwithstanding the effected by this Act in sub-section (2) were repealed by s 3 of the Repealing and Amending Act 1914 (X of 1914)

expressly applied to pending proceedings, and all the provisions of the said Indian Insolvency Act shall, except as aforesaid, apply there to as if the Act had not been passed.

THE FIRST SCHEDULE.

(See section 20.)

MEETINGS OF CREDITORS.

1. The official assignee may at any time summon a meeting of creditors, and shall do so whenever ordered by the Court or by the creditors by resolution at any meeting or whenever requested in writing by one-fourth in value of the creditors who have proved.

2. Meetings shall be summoned by sending notice of the time and place thereof to each creditor at the address given in his proof, or, if he has not proved, at the address given in the insolvent's schedule, or such other address as may be known to the official assignee.

3. The notice of any meeting shall be sent at not less than seven days before the day appointed for the meeting and may be delivered personally or sent by prepaid post letter, as may be convenient.

The official assignee may, if he thinks fit, also publish the time and place of any meeting in any local newspaper or in the local official Gazette.

4. It shall be the duty of the insolvent to attend any meeting which the official assignee may, by notice, require him to attend, and any adjournment thereof, such notice shall be either delivered to him personally or sent to him at his address by post at least three days before the day fixed for the meeting.

5. The proceedings held and resolutions passed at any meeting shall, unless the Court otherwise orders, be valid notwithstanding that any creditor has not received the notice sent to him.

6. A certificate of the official assignee that the notice of any meeting has been duly given shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

7. Where on the request of creditors the official assignee summons a meeting, there shall be deposited with the written request the sum of one rupee for every twenty creditors for the cost of sum-

moning the meeting including all disbursements Provided that the official assignee may require such further sum to be deposited as in his opinion shall be sufficient to cover the costs and expenses of the meeting

Chairman 8 The official assignee shall be the chairman of any meeting

9 A creditor shall not be entitled to vote at a meeting unless he has duly proved a debt provable in insolvency to be due to him from the insolvent and the proof has been duly lodged one clear day before the time appointed for the meeting

Right to vote 10 A creditor shall not vote at any such meeting in respect of any unliquidated or contingent debt or any certain debts debt the value of which is not ascertained

11 For the purpose of voting a secured creditor shall unless he surrenders his security state in his proof the particulars of his security the date when it was given and the value at which he assesses it and shall be entitled to vote only in respect of the balance if any due to him after deducting the value of his security If he votes in respect of his whole debt he shall be deemed to have surrendered his security unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence

12 Where a creditor seeks to prove in respect of a bill of exchange, promissory note or other negotiable instrument or security on which the insolvent is liable such bill of exchange note instrument or security must subject to any special order of the Court made to the contrary be produced to the official assignee before the proof can be admitted to voting

13 It shall be competent to the official assignee within twenty-eight days after a proof estimating the value of a security has been made use of in voting to require the creditor to give up the security for the benefit of the creditors generally on payment of the value so estimated

14 If one partner in a firm is adjudged insolvent any creditor to whom that partner is indebted jointly with the other partners in the firm or any of them may prove his debt for the purpose of voting at any meeting of creditors and shall be entitled to vote thereat

15 The official assignee shall have power to admit or reject a proof for the purpose of voting but his decision shall be subject to appeal to the Court If he is in doubt whether the proof of a creditor should be admitted or rejected he shall mark the proof as objected to, ~

Power of official assignee to admit or reject proof

shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained

Proxy 16 A creditor may vote either in person or by proxy

Instrument of proxy 17 Every instrument of proxy shall be in the prescribed form and shall be issued by the official assignee

General proxy 18 A creditor may give a general proxy to his attorney or to his manager or clerk, or any other person in his regular employment In such case the instrument of proxy shall state the relation in which the person to act thereunder stands to the creditor

Proxy to be deposited one day before date of meeting 19 A proxy shall not be used unless it is deposited with the official assignee one clear day before the time appointed for the meeting at which it is to be used

Official assignee as proxy 20 A creditor may appoint the official assignee to act as his proxy

Adjournment of meeting 21 The official assignee may adjourn the meeting from time to time and from place to place, and no notice of the adjournment shall be necessary

Minute of proceedings 22 The official assignee shall draw up a minute of the proceedings at the meeting and shall sign the same

THE SECOND SCHEDULE

(See section 48)

PROOF OF DEBTS

Proofs in ordinary cases

Time for lodging proof 1 Every creditor shall lodge the proof of his debt as soon as may be after the making of an order of adjudication

Mode of lodging proof 2 A proof may be lodged by delivering or sending by post in a registered letter to the official assignee an affidavit verifying the debt

Authority to make affidavit 3 The affidavit may be made by the creditor himself or by some person authorized by or on behalf of the creditor If made by a person so authorized it shall state his authority and means of knowledge

4 The affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated. The official assignee may at any time call for the production of the vouchers.

Contents of affidavit

5 The affidavit shall state whether the creditor is or is not a secured creditor.

Affidavit to state if creditor holds security

6 A creditor shall bear the cost of proving his debt unless the Court otherwise specially orders.

Cost of proving debts

7 Every creditor who has lodged a proof shall be entitled to see and examine the proofs of other creditors at all reasonable times.

Right to see and examine proof

8 A creditor in lodging his proofs shall deduct from his debt all trade discounts, but he shall not be compelled to deduct any discount not exceeding five per centum on the net amount of his claim, which he may have agreed to allow for payment in cash.

Deduction to be made from proof

Proof by secured creditors

Proof where security realized

9 If a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realized.

Proof where security is surrendered

10 If a secured creditor surrenders his security to the official assignee for the general benefit of the creditors, he may prove for his whole debt.

11 If a secured creditor does not either realize or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

Proof in other cases

12 (1) Where a security is so valued the official assignee may at any time redeem it on payment to the creditor of the assessed value.

Valuation of security

(2) If the official assignee is dissatisfied with the value at which a security is assessed, he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed on between the creditor and the official assignee or as, in default of agreement, the Court may

direct If the sale is by public auction, the creditor, or the official assignee on behalf of the estate, may bid or purchase

Provided that the creditor may at any time, by notice in writing, require the official assignee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realized, and if the official assignee does not, within six months after receiving the notice, signify in writing to the creditor his election to exercise the power he shall not be entitled to exercise it, and the equity of redemption, or any other interest in the property comprised in the security which is vested in the official assignee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued

13 Where a creditor has so valued his security, he may at any time amend the valuation and proof on showing to the satisfaction of the official assignee or the Court, that the valuation and proof were made *bona fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the official assignee shall allow the amendment without application to the Court

14 Where a valuation has been amended in accordance with the foregoing rule, the creditor shall forthwith repay any surplus dividend which he has received in excess of that to which he would have been entitled on the amended valuation, or, as the case may be, shall be entitled to be paid out of any money for the time being available for dividend any dividend or share of dividend which he has failed to receive by reason of the inaccuracy of the original valuation, before that money is made applicable to the payment of any future dividend, but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment

15 If a creditor after having valued his security subsequently realizes it, or if it is realized under the provisions of rule 12, the net amount realized shall be substituted for the amount of any valuation previously made by the creditor and shall be treated in all respects as an amended valuation made by the creditor

16 If a secured creditor does not comply with the foregoing rules, he shall be excluded from all share in any dividend

17 Subject to the provisions of rule 12, a creditor shall in no case receive more than sixteen annas in the rupee and interest as provided by this Act

Taking Accounts of Property Mortgaged and of the Sale thereof

18 Upon application by any person claiming to be a mortgagee of any part of the insolvent's real or leasehold estate and whether such mortgage is by deed or otherwise, and whether the same is of a legal or equitable nature, or upon application by the official assignee with the consent of such person claiming to be a mortgagee as aforesaid the Court shall proceed to inquire whether such person is such mortgagee and for what consideration and under what circumstances and if it is found that such person is such mortgagee and if no sufficient objection appears to the title of such person to the sum claimed by him under such mortgage the Court shall direct such accounts and inquiries to be taken as may be necessary for ascertaining the principal interest and costs due upon such mortgage, and of the rents and profits or dividends interest or other proceeds received by such person or by any other person by his order or for his use in case he has been in possession of the property over which the mortgage extends or any part thereof and the Court if satisfied that there ought to be a sale shall direct notice to be given in such newspapers as the Court thinks fit when and where and by whom and in what way the said premises or property or the interest therein so mortgaged, are to be sold and that such sale be made accordingly, and that the official assignee (unless it is otherwise ordered) shall have the conduct of such sale but it shall not be imperative on any such mortgagee to make such application At any such sale the mortgagee may bid and purchase

19 All proper parties shall join in the conveyance to the purchaser, as the Court directs

20 The monies to arise from such sale shall be applied in the first place, in payment of the costs, charges and expenses of and occasioned by the application to the Court, and of such sale and the commission (if any) of the official assignee, and in the next place in payment and satisfaction so far as the same extend, of what shall be found due to such mortgagee for principal interest and costs, and the surplus of the sale monies (if any) shall then be paid to the official assignee But if the monies to arise from such sale are insufficient to pay and satisfy what is so found due to such mortgagee, then he shall be entitled to prove as a creditor for such deficiency, and receive dividends thereon rateably with the other creditors, but so as not to disturb any dividend then already declared

21 For the better taking of such inquiries and accounts, and making a title to the purchaser all parties may be examined by the Court upon interrogatories or otherwise as the Court thinks fit, and shall produce before the Court upon oath all

Proceedings on inquiry

papers, books and writings in their respective custody or power relating to the estate or effects of the insolvent as the Court directs

Periodical payments

22 When any rent or other payment falls due at stated periods, and the order of adjudication is made at any time other than one of those periods, the person entitled to the rent or payment may prove for a proportionate part thereof up to the date of the order as if the rent or payment grew due from day to day

Interest

23 (1) On any debt or sum certain whereon interest is not reserved or agreed for, and which is overdue when the debtor is adjudged an insolvent and which is provable under this Act, the creditor may prove for interest at a rate not exceeding six per centum per annum—

(a) if the debt or sum is payable by virtue of a written instalment at a certain time from the time when such debt or sum was payable to the date of such adjudication or,

(b) if the debt or sum is payable otherwise, from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment to the date of such adjudication

(2) Where a debt which has been proved in insolvency includes interest or any pecuniary consideration in lieu of interest the interest or consideration shall for the purposes of dividend, be calculated at a rate not exceeding six per centum per annum, without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full

Debt payable at a future time

24 A creditor may prove for a debt not payable when the debtor is adjudged an insolvent as if it were payable presently and may receive dividends equally with the other creditors, deducting therefrom only a rebate of interest at the rate of six per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted

Admission or rejection of proofs

25 The official assignee shall examine every proof and the grounds of the debt, and in writing admit or reject it in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection

26. If the official assignee thinks that a proof has been improperly admitted, the Court may, on the application of the official assignee, after notice to the creditor who made the proof, expunge the proof or reduce its amount

Court may expunge proof improperly received

27. The Court may also expunge or reduce a proof upon the application of a creditor if the official assignee declines to interfere in the matter or in the case of a composition or a scheme upon the application of the insolvent

Power for Court to expunge or reduce proof

[THE THIRD SCHEDULE —Enactment repealed] Repealed by sec 3 and Sch II of the Repealing and Amending Act 1914 (X of 1914)

APPENDIX H.

The Bankruptcy Act, 1914.

As amended by Bankruptcy (Amended) Act, 1926*

An Act to consolidate the Law relating to Bankruptcy [10th Aug 1914]

PART I

PROCEEDINGS FROM ACT OF BANKRUPTCY TO DISCHARGE

Acts of Bankruptcy

- Acts of bankruptcy
- 1.** (1) A debtor commits an act of bankruptcy in each of the following cases —
- (a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally
 - (b) If in England or elsewhere he makes a fraudulent conveyance, gift delivery, or transfer of his property, or of any part thereof,
 - (c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt,
 - (d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs

* Alterations and additions made by the Act of 1926 are printed in square brackets

from his dwelling house, or otherwise absents himself, or begins to keep house,

- (e) If execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days,

Provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between that date at which such summons is taken out and the date at which the proceedings on such summons are finally disposed of, settled, or abandoned, shall not be taken into account in calculating such period of twenty-one days,

- (f) If he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself,

- (g) If a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service either comply with the requirements of the notice or satisfy the Court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained

For the purposes of this paragraph and of section two of this Act, any person who is, for the time being, entitled to enforce a final judgment or final order, shall be deemed to be a creditor who has obtained a final judgment or final order

- (h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts

(2) In this Act, the expression "a debtor" unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him—

- (a) was personally present in England, or
- (b) ordinarily resided or had a place of residence in England, or
- (c) was carrying on business in England, personally, or by means of an agent or manager, or
- (d) was a member of a firm or partnership which carried on business in England

2. A bankruptcy notice under this Act shall be in the prescribed form, and shall require the debtor to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, or to secure or compound for it to the satisfaction of the creditor, or the Court, and shall state the consequences of non-compliance with the notice, and shall be served in the prescribed manner

Bankruptcy notices. Provided that a bankruptcy notice—

- (i) may specify an agent to act on behalf of the creditor in respect of any payment or other thing required by the notice to be made to, or done to the satisfaction of, the creditor,
- (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due, unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such misstatement but, if the debtor does not give such notice, he shall be deemed to have complied with the bankruptcy notice if within the time allowed he takes such steps as would have constituted a compliance with the notice had the actual amount due been correctly specified therein

Receiving Order

3. Subject to the conditions herein-after specified if a debtor commits an act of bankruptcy the Court may on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate

Jurisdiction to make receiving order
Conditions on which creditor may petition

4. (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—

- (a) the debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition the aggregate amount of debts owing to the several petitioning creditors amounts to fifty pounds and
- (b) the debt is liquidated sum payable either immediately or at some certain future time, and
- (c) the act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition, and
- (d) the debtor is domiciled in England or within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in England or (except in the case of a person domiciled in Scotland or Ireland or a firm or partnership having its principal place of

business in Scotland or Ireland) has carried on business in England, personally or by means of an agent or manager, or (except as aforesaid) is or within the said period has been a member of a firm or partnership of persons which has carried on business in England by means of a partner or partners, or an agent or manager,

nor, where a deed of arrangement has been executed, shall a creditor be entitled to present a bankruptcy petition founded on the execution of the deed, or on any other act committed by the debtor in the course or for the purpose of the proceedings preliminary to the execution of the deed, in cases where he is prohibited from so doing by the law for the time being in force relating to deeds of arrangement

(2) If the petitioning creditor is a secured creditor, he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same manner as if he were an unsecured creditor

Proceedings and order on creditor's petition

5. (1) A creditor's petition shall be verified by affidavit of the creditor, or of some person on his behalf having knowledge of the facts, and served in the prescribed manner

(2) At the hearing the Court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition

(3) If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition

(4) When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure, or compound for a judgment debt, or sum ordered to be paid, the Court may, if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment or order

(5) Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the Court on such security (if any) being given as the Court may require for payment to the petitioner of any debt which may be established against him in due course of law, and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on

the petition for such time as may be required for trial of the question relating to the debt

(6) Where proceedings are stayed, the Court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make a receiving order on the petition of some other creditor, and shall thereupon dismiss on such terms as it thinks just, the petition in which proceedings have been stayed as aforesaid

(7) A creditor's petition shall not, after presentment, be withdrawn without the leave of the Court

6. (1) A debtor's petition shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the Court shall thereupon make a receiving order

(2) A debtor's petition shall not, after presentment, be withdrawn without the leave of the Court

7. (1) On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act no creditor to whom the debtor is indebted in respect of any debt probable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose

(2) But this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed

8. The Court may, if it is shown to be necessary for the protection of the estate, at any time after the presentation of a bankruptcy petition and before a receiving order is made, appoint the Official Receiver to be interim receiver of the property of the debtor or of any part thereof and direct him to take immediate possession thereof or of any part thereof

9. (1) The Court may, at any time after the presentation of a bankruptcy petition, stay any action execution, or other legal process against the property or person of the debtor and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just

(2) With respect to the summoning of and proceedings at the first and other meetings of creditors, the rules in the First Schedule to this Act shall be observed

14. (1) Where a receiving order is made against a debtor he shall make out and submit to the Official Receiver a statement of and in relation to his affairs in the prescribed form verified by affidavit and showing the particulars of the debtor's assets debt, and liabilities the names residences and occupations of his creditors, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as may be prescribed or as the Official Receiver may require

(2) The statement shall be so submitted within the following times, namely —

(i) If the order is made on the petition of the debtor, within three days from the date of the order

(ii) If the order is made on the petition of a creditor within seven days from the date of the order

but the Court may in either case for special reasons extend the time

(3) If the debtor fails without reasonable excuse to comply with the requirements of this section the Court may on the application of the Official Receiver or of any creditor adjudge him bankrupt

(4) Any person stating himself in writing to be a creditor of the bankrupt may personally or by agent inspect the statement at all reasonable times and take any copy thereof or extract therefrom but any person untruthfully so stating himself to be a creditor shall be guilty of a contempt of Court and shall be punishable accordingly on the application of the trustee or Official Receiver

Public Examination of Debtor

15. (1) Where the Court makes a receiving order it shall save as in this Act provided hold a public sitting on a day to be appointed by the Court for the examination of the debtor and the debtor shall attend thereat and shall be examined as to his conduct dealings and property

(2) The examination shall be held as soon as conveniently may be after the expiration of the time for the submission of the debtor's statement of affairs

(3) The Court may adjourn the examination from time to time

(4) Any creditor who has tendered a proof or his representative authorised in writing may question the debtor concerning his affairs and the causes of his failure

(5) The Official Receiver shall take part in the examination of the debtor and for the purpose thereof if specially authorised by the Board of Trade may employ a solicitor with or without counsel

(6) If a trustee is appointed before the conclusion of the examination, he may take part therein

(7) The Court may put such questions to the debtor as it may think expedient

(8) The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing and shall be read over either to or by the debtor and signed by him, and may thereafter, save as in this Act provided, be used in evidence against him, they shall also be open to the inspection of any creditor at all reasonable times

(9) When the Court is of opinion that the affairs of the debtor have been sufficiently investigated it shall by order declare that his examination is concluded, but such order shall not be made until after the day appointed for the first meeting of creditors

(10) Where the debtor is a lunatic or suffers from any such mental or physical affliction or disability as in the opinion of the Court makes him unfit to attend his public examination, the Court may make an order dispensing with such examination, or directing that the debtor be examined on such terms, in such manners and at such place as to the Court seems expedient

Composition or Scheme of Arrangement

16. (1) Where a debtor intends to make a proposal for a composition in satisfaction of his debts or a proposal for a scheme of arrangement of his affairs, Compositions and schemes of arrangement he shall, within four days of submitting his statement of affairs or within such time thereafter as the Official Receiver may fix, lodge with the Official Receiver a proposal in writing signed by him, embodying the terms of the composition or scheme which he is desirous of submitting for the consideration of his creditors, and setting out particulars of any sureties or securities proposed

(2) In such case the Official Receiver shall hold a meeting of creditors before the public examination of the debtor is concluded, and send to each creditor, before the meeting, a copy of the debtor's proposal with a report thereon, and if at that meeting a majority in number and three fourths in value of all the creditors who have proved, resolve, to accept the proposal it shall be deemed to be duly accepted by the creditors and when approved by the Court shall be binding on all the creditors

(3) The debtor may at the meeting amend the terms of his proposal if the amendment is in the opinion of the Official Receiver, calculated to benefit the general body of creditors

(4) Any creditor who has proved his debt may assent to or dissent from the proposal by a letter in the prescribed form addressed to the

Official Receiver so as to be received by him not later than the day preceding the meeting, and any such assent or dissent shall have effect as if the creditor had been present and had voted at the meeting

(5) The debtor or the Official Receivers may, after the proposal is accepted by the creditors, apply to the Court to approve it, and notice of the time appointed for hearing the application shall be given to each creditor who has proved

(6) The application shall not be heard until after the conclusion of the public examination of the debtor. Any creditor who has proved may be heard by the Court in opposition to the application, notwithstanding that he may at a meeting of creditors have voted for the acceptance of the proposal

(7) For the purpose of approving a composition or scheme by joint debtors the Court may if it thinks fit and on the report of the Official Receiver that it is expedient so to do, dispense with the public examination of one of the joint debtors, if he is unavoidably prevented from attending the examination by illness or absence from the United Kingdom

(8) The Court shall before approving the proposal hear a report of the Official Receiver as to the terms thereof and as to the conduct of the debtor and any objections which may be made by or on behalf of any creditor

(9) If the Court is of opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors or in any case in which the Court is required where the debtor is adjudged bankrupt to refuse his discharge the Court shall refuse to approve the proposal

(10) If any facts are proved on proof of which the Court would be required either to refuse suspend or attach conditions to the debtor's discharge were he adjudged bankrupt the Court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than five shillings in the pound on all the unsecured debts provable against the debtor's estate

(11) In any other case the Court may either approve or refuse to approve the proposal

(12) If the Court approves the proposal the approval may be testified by the seal of the Court being attached to the instrument containing the terms of the proposed composition or scheme or by the terms being embodied in an order of the Court

(13) A composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy but shall not release the debtor from any liability under a judgment against him in an action for seduction or under an affiliation order or under a judgment against him as a co-respondent in a matrimonial cause except to such an extent and under such conditions as the Court expressly orders in respect of such liability

(14) A certificate of the Official Receiver that a composition or scheme has been duly accepted and approved shall, in the absence of fraud, be conclusive as to its validity

(15) The provisions of a composition or scheme under this section may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court

(16) If default is made in payment of any instalment due in pursuance of the composition or scheme or if it appears, to the Court, on satisfactory evidence that the composition or scheme cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the Court was obtained by fraud the Court may, if it thinks fit on application by the Official Receiver or the trustee or by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme, but without prejudice to the validity of any sale, disposition or payment duly made or thing duly done under or in pursuance of the composition or scheme. Where a debtor is adjudged bankrupt under this subsection, any debt provable in other respects which has been contracted before the adjudication, shall be provable in the bankruptcy

(17) If under or in pursuance of a composition or scheme a trustee is appointed to administer the debtor's property or manage his business or to distribute the composition, section twenty five and Part IV of this Act shall apply as if the trustee were a trustee in a bankruptcy, and as if the terms 'bankruptcy', 'bankrupt' and 'order of adjudication' included respectively a composition or scheme of arrangement, a compounding or arranging debtor, and an order approving the composition or scheme

(18) Part II of this Act shall so far as the nature of the case and the terms of the composition or scheme admit, apply thereto, the same interpretation being given to the words 'trustee', 'bankruptcy', 'bankrupt' and 'order of adjudication' as in the last preceding sub section

(19) No composition or scheme shall be approved by the Court which does not provide for payment in priority to other debts of all debts directed to be so paid in the distribution of the property of a bankrupt

(20) The acceptance by a creditor of a composition or scheme shall not release any person who under this Act would not be released by an order of discharge if the debtor had been adjudged bankrupt

17. Notwithstanding the acceptance and approval of a composition or scheme, the composition or scheme shall not be binding on any creditor so far as regards a debt or liability from which under the provision of this Act, the debtor would not be released by an order of discharge in bankruptcy unless the creditor assents to the composition or scheme

Effect of composition or scheme

Adjudication of Bankruptcy.

18. (1) Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt or pass no resolution, or if the creditors do not meet or if a composition or scheme is not approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the Court may allow, the Court shall adjudge the debtor bankrupt, and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee

Adjudication of bankruptcy where composition not accepted or approved

(2) Notice of every order adjudging a debtor bankrupt, stating the name, address, and description of the bankrupt, the date of the adjudication, and the Court by which the adjudication is made, shall be gazetted and advertised in a local paper in the prescribed manner, and the date of the order shall, for the purposes of this Act be the date of the adjudication

19. (1) Where a debtor is adjudged bankrupt, or the creditors have resolved that he be adjudged bankrupt, the creditors may by ordinary resolution appoint some fit person, whether a creditor or or not to fill the office of trustee of the property of the bankrupt, or they may resolve to leave his appointment to the committee of inspection hereinafter mentioned

Appointment of trustee

A person shall be deemed not fit to act as trustee of the property of the bankrupt where he has been previously removed from the office of trustee of a bankrupt's property for misconduct or neglect of duty

(2) The person so appointed shall give security in manner prescribed to the satisfaction of the Board of Trade and the Board, if satisfied with the security, shall certify that his appointment has been duly made, unless they object to the appointment on the ground that it has not been made in good faith by a majority in value of the creditors voting, or that the person appointed is not fit to act as trustee, or that his connexion with or relation to the bankrupt or his estate or any particular creditor makes it difficult for him to act with impartiality in the interests of the creditors generally

(3) Provided that where the Board make any such objection they shall, if so requested by a majority in value of the creditors notify the objection to the High Court, and thereupon the High Court may decide on its validity

(4) The appointment of a trustee shall take effect as from the date of the certificate

(5) The Official Receiver shall not save as by this Act provided be the trustee of the bankrupt's property

(6) If a trustee is not appointed by the creditors within four w

from the date of the adjudication or in the event of there being negotiations for a composition or scheme pending at the expiration of those four weeks, then within seven days from the close of those negotiations by the refusal of the creditors to accept, or of the Court to approve, the composition or scheme, the Official Receiver shall report the matter to the Board of Trade, and thereupon the Board of Trade shall appoint some fit person to be trustee of the bankrupt's property, and shall certify the appointment

(7) Provided that the creditors or the committee of inspection (if so authorised by resolution of the creditors) may, at any subsequent time, if they think fit appoint a trustee, and, on the appointment being made and certified, the person appointed shall become trustee in the place of the person appointed by the Board of Trade

(8) When a debtor is adjudged bankrupt after the first meeting of the creditors has been held and a trustee has not been appointed prior to the adjudication the Official Receiver shall forthwith summon a meeting of creditors for the purpose of appointing a trustee

20. (1) The creditors qualified to vote may, at their first or any subsequent meeting by resolution appoint a committee of inspection for the purpose of superintending the administration of the bankrupt's property by the trustee

Committee of inspection

(2) The committee of inspection shall consist of not more than five nor less than three persons possessing one or other of the following qualifications —

(a) That of being a creditor or the holder of a general proxy or general power of attorney from a creditor, provided that no creditor and no holder of a general proxy or general power of attorney from a creditor shall be qualified to act as a member of the committee of inspection until the creditor has proved his debt and the proof has been admitted or

(b) That of being a person to whom a creditor intends to give a general proxy or general power of attorney, provided that no such person shall be qualified to act as a member of the committee of inspection until he holds such a proxy or power of attorney, and until the creditor has proved his debt and the proof has been admitted

(3) The committee of inspection shall meet at such times as they shall from time to time appoint and failing such appointment at least once a month and the trustee or any member of the Committee may also call a meeting of the committee as and when he thinks necessary

(4) The committee may act by a majority of their members present at a meeting but shall not act unless a majority of the committee are present at the meeting

(5) Any member of the committee may resign his office by notice in writing signed by him and delivered to the trustee

(6) If a member of the committee becomes bankrupt, or compounds or arranges with his creditor, or is absent from five consecutive meetings of the committee, his office shall thereupon become vacant

(7) Any member of the committee may be removed by an ordinary resolution at any meeting of creditors of which seven days' notice has been given stating the object of the meeting

(8) On a vacancy occurring in the office of a member of the committee the trustee shall forthwith summon a meeting of creditors for the purpose of filling the vacancy, and the meeting may by resolution appoint another creditor or other person eligible as above to fill the vacancy

(9) The continuing members of the committee, provided there be not less than two such continuing members, may act notwithstanding any vacancy in their body, and where the number of members of the committee of inspection is for the time being less than five, the creditors may increase that number so that it do not exceed five

(10) If there be no committee of inspection, any act or thing or any direction or permission by this Act authorised or required to be done or given by the committee may be done or given by the Board of Trade on the application of the trustee

21. (1) Where a debtor is adjudged bankrupt the creditors may, if they think fit at any time after the adjudication by a majority in number and three-fourths in value of all the creditors who have proved, resolve to accept a proposal for a composition in satisfaction of the debts

Power to accept composition or scheme after bankruptcy adjudication due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs and thereupon the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication

(2) If the Court approves the composition or scheme it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as the Court may appoint, on such terms and subject to such conditions, if any, as the Court may declare

(3) If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any person interested adjudge the debtor bankrupt, and annul the composition or scheme, but without prejudice to the validity of any sale, disposition or payment duly made, or thing duly done, under or in pursuance of the composition or scheme Where a debtor is adjudged bankrupt under this sub-section, all debts, provable in other respects, which have been contracted before the date of such adjudication, shall be provable in the bankruptcy

Control over Person and Property of Debtor

22. (1) Every debtor against whom a receiving order is made shall unless prevented by sickness or other sufficient cause, attend the first meeting of his creditors, and shall submit to such examination and give such information as the meeting may require

Duties of debtor as to discovery and realisation of property

(2) He shall give such inventory of his property, such list of his creditors and debtors, and of his debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend such other meetings of his creditors, wait at such time on the Official Receiver, special manager or trustee, execute such powers of attorney, conveyances, deeds and instruments, and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be reasonably required by the Official Receiver, special manager, or trustee, or may be prescribed by general rules, or be directed by the Court by any special order or orders made in reference to any particular case or made on the occasion of any special application by the Official Receiver, special mannager, trustee, or any creditor or person interested

(3) He shall if adjudged bankrupt, aid, to the utmost of his power, in the realisation of his property and the distribution of the proceeds among his creditors

(4) If a debtor wilfully fails to perform the duties imposed on him by this section or to deliver up possession of any part of his property which is divisible amongst his creditors under this Act, and which is for the time being in his possession or under his control, to the Official Receiver or to the trustee, or to any person authorised by the Court to take possession of it, he shall in addition to any other punishment to which he may be subject, be guilty of a contempt of Court, and may be punished accordingly

23. (1) The Court may, by warrant addressed to any constable or prescribed officer of the Court, cause a debtor to be arrested, and any books papers money and goods in his possession to be seized, and him and them to be safely kept as prescribed

Arrest of debtor under certain circumstances

until such time as the Court may order under the following circumstances —

(a) If, after a bankruptcy notice has been issued under this Act, or after presentation of a bankruptcy petition by or against him, it appears to the Court that there is probable reason for believing that he has absconded, or is about to abscond, with a view of avoiding payment of the debt in respect of which the bankruptcy notice was issued, or of avoiding service of a bankruptcy petition or of avoiding appearance to any such petition or of avoiding examination in respect of his affairs, or of otherwise avoiding, delaying or embarrassing proceedings in bankruptcy against him

(b) If, after presentation of a bankruptcy petition by or against him, it appears to the Court that there is probable cause for believing that he is about to remove his goods with a view of preventing or delaying possession being taken of them by the Official Receiver or trustee, or that there is probable ground for believing that he has concealed or is about to conceal or destroy any of his goods, or any books, documents or writings which might be of use to his creditors in the course of his bankruptcy

(c) If, after service of a bankruptcy petition on him or after a receiving order is made against him, he removes any goods in his possession above the value of five pounds, without the leave of the Official Receiver or trustee

(d) If, without good cause shown he fails to attend any examination ordered by the Court

Provided that no arrest upon a bankruptcy notice shall be valid and protected, unless the debtor before or at the time of his arrest is served with such bankruptcy notice

(2) No payment or composition made or security given after arrest made under this section shall be exempt from the provisions of this Act relating to fraudulent preferences

24. Where a receiving order is made against a debtor, the Court,

on the application of the Official Receiver or trustee, may from time to time order that for such time not exceeding three months, as the Court thinks fit, post letters, telegrams and other postal packets, addressed to the debtor at any place or places mentioned in the order for re-direction shall be re-directed sent or delivered by the Postmaster-General, or the officers acting under him to the Official Receiver or the trustee, or otherwise, as the Court directs, and the same shall be done accordingly

Redirection of debtor's letters

25. (1) The Court may, on the application of the Official Receiver

Enquiry as to debtor's conduct dealings and property

or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person the Court may deem capable of giving information respecting his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor's dealings or property

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the Court at the time of its sitting and allowed by

the Court may, by warrant, cause him to be apprehended and brought up for examination

(3) The Court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings, or property.

(4) If any person on examination before the Court admits that he is indebted to the debtor, the Court may, on the application of the Official Receiver or trustee, order him to pay to the Official Receiver or trustee, at such time and in such manner as to the Court seems expedient, the amount admitted, or any part thereof, either in full discharge of the whole amount in question or not, as the Court thinks fit, with or without costs of the examination

(5) If any person on examination before the Court admits that he has in his possession any property belonging to the debtor, the Court may on the application of the Official Receiver or trustee, order him to deliver to the Official Receiver or trustee such property, or any part thereof, at such time, and in such manner, and on such terms, as to the Court may seem just

(6) The Court may, if it thinks fit, order that any person who if in England would be liable to be brought before it under this section shall be examined in Scotland or Ireland, or in any other place out of England

26. (1) A bankrupt may, at any time after being adjudged bankrupt, apply to the Court for an order of discharge, and the Court shall appoint a day for hearing the application, but the application shall not be heard until the public examination of the bankrupt is concluded. The application shall, except when the Court in accordance with rules under this Act otherwise directs, be heard in open Court

Discharge of bankrupt

(2) On the hearing of the application the Court shall take into consideration a report of the Official Receiver as to the bankrupt's conduct and affairs (including a report as to the bankrupt's conduct during the proceedings under his bankruptcy), and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property

[Provided that where the bankrupt has committed any misdemeanour under this Act, or any enactment repealed by this Act, or any other misdemeanour connected with his bankruptcy or any felony connected with his bankruptcy, or where in any case any of the facts hereinafter mentioned are proved, the Court shall either—, and]

- (i) refuse the discharge, or
- (ii) suspend the discharge for [such] period [as the Court thinks proper or]
- (iii) suspend the discharge until a dividend of not less than ten shillings in the pound has been paid to the creditors, or

- (ii) require the bankrupt as a condition of his discharge to consent to judgment being entered against him by the Official Receiver or trustee for any balance or part of any balance of the debts provable under the bankruptcy which is not satisfied at the date of the discharge, such balance or part of any balance of the debts to be paid out of the future earnings or after acquired property of the bankrupt in such manner and subject to such conditions as the Court may direct but execution shall not be issued on the judgment without leave of the Court which leave may be given on proof that the bankrupt has since his discharge acquired property or income available towards payment of his debts

Provided that if at any time after the expiration of two years from the date of any order made under this section the bankrupt satisfies the Court that there is no reasonable probability of his being in a position to comply with the terms of such order the Court may modify the terms of the order or of any substituted order in such manner and upon such conditions as it may think fit

(3) The facts hereinbefore referred to are —

- (a) that the bankrupt's assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities unless he satisfies the Court that the fact that the assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible
- (b) that the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy
- (c) that the bankrupt has continued to trade after knowing himself to be insolvent
- (d) that the bankrupt has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it
- (e) that the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities
- (f) that the bankrupt has brought on or contributed to his bankruptcy by rash and hazardous speculations or by unjustifiable extravagance in living or by gambling or by culpable neglect of his business affairs
- (g) that the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any act properly brought against him

(h) [that the bankrupt has brought on or contributed to his bankruptcy by incurring unjustifiable expense in bringing any frivolous or vexatious action,]

(i) that the bankrupt has within three months preceding the date of the receiving order, when unable to pay his debts as they become due given an undue preference to any of his creditors

(j) that the bankrupt has within three months preceding the date of the receiving order incurred liabilities with a view of making his assets equal to ten shillings in the pound on the amount of his unsecured liabilities

(k) that the bankrupt has on any previous occasion, been adjudged bankrupt or made a composition or arrangement with his creditors

(l) that the bankrupt has been guilty of any fraud or fraudulent breach of trust

(4) with a view to removing any statutory disqualification on account of bankruptcy which is removed if the bankrupt obtains from the Court his discharge with a certificate to the effect that the bankruptcy was caused by misfortune without any misconduct on his part, the Court may if it thinks fit grant such a certificate but a refusal to grant such a certificate shall be subject to appeal

(5) For the purposes of this section a bankrupt's assets shall be deemed of a value equal to ten shillings in the pound on the amount of his unsecured liabilities when the Court is satisfied that the property of the bankrupt has realised or is likely to realise, or with due care in realisation might have realised an amount equal to ten shillings in the pound on his unsecured liabilities, and a report by the Official Receiver or the trustee shall be *prima facie* evidence of the amount of such liabilities

(6) For the purposes of this section the report of the official receiver shall be *prima facie* evidence of the statements therein contained

(7) Notice of the appointment by the Court of the day for hearing the application for discharge shall be published in the prescribed manner and sent fourteen days at least before the day so appointed to each creditor who has proved, and the Court may hear the official receiver and the trustee and may also hear any creditor. At the hearing the Court may put such questions to the debtor and receive such evidence as it may think fit

(8) The powers of suspending and of attaching conditions to a bankrupt's discharge may be exercised concurrently

(9) A discharged bankrupt shall notwithstanding his discharge, give such assistance as the trustee may require in the realisation and distribution of such of his property as is vested in the trustee, and if he fails to do so he shall be guilty of a contempt of Court and the Court

may also, if it thinks fit, revoke his discharge, but without prejudice to the validity of any sale disposition or payment duly made or thing duly done subsequent to the discharge but before its revocation

Fraudulent settlements **27.** In either of the following cases that is to say—

- (i) in the case of a settlement made before and in consideration of marriage where the settlor is not at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, or
- (ii) in the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife),

if the settlor is adjudged bankrupt or compounds or arranges with his creditors and it appears to the Court that such settlement covenant or contract was made in order to defeat or delay creditors or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made the Court may refuse or suspend an order of discharge or grant an order subject to conditions or refuse to approve a composition or arrangement as the case may be in like manner as in cases where the debtor has been guilty of fraud

Effect of order of discharge **28** (1) An order of discharge shall not release the bankrupt—

- (a) from any debt on a recognisance nor from any debt with which the bankrupt may be chargeable at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence, and he shall not be discharged from such excepted debts unless the Treasury certify in writing their consent to his being discharged therefrom or
- (b) from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party nor from any debt or liability whereof he has obtained for bearance by any fraud to which he was a party or
- (c) from any liability under a judgment against him in an action for seduction or under an affiliation order or under a judgment against him as a co respondent in a matrimonial cause except to such an extent and under such conditions as the Court expressly orders in respect of such liability

(2) An order of discharge shall release the bankrupt from all debts provable in bankruptcy

(3) An order of discharge shall be conclusive evidence of the bankruptcy, and of the validity of the proceedings therein and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order the bankrupt may plead that the cause of action occurred before his discharge

(4) An order of discharge shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt, or was jointly bound or had made any joint contract with him or any person who was surety or in the nature of a surety for him

29. (1) Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may, on the application of any person interested, by order annul the adjudication

Power for Court to annul adjudication in certain cases

(2) Where an adjudication is annulled under this section all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Official Receiver, trustee, or other person acting under their authority, or by the Court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the Court may appoint or in default of any such appointment, revert to the debtor for all his estate or interest therein on such terms and subject to such conditions if any as the Court may declare by order

(3) Notice of the order annulling an adjudication shall be forthwith gazetted and published in a local paper

(4) For the purposes of this section, any debt disputed by a debtor shall be considered as paid in full if the debtor enters into a bond in such sum and with such sureties as the Court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into Court

PART II

ADMINISTRATION OF PROPERTY

Proof of Debts

30. (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust shall not be provable in bankruptcy

Description of debts provable in bankruptcy

(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice

(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy

(4) An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value

(5) Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the Court

(6) If, in the opinion of the Court, the value of the debt or liability is incapable of being fairly estimated the Court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy

(7) If, in the opinion of the Court, the value of the debt or liability is capable of being fairly estimated the Court may direct the value to be assessed before the Court itself without the intervention of a jury, and may give all necessary directions for this purpose and the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy

(8) liability shall, for the purposes of this Act include—

(a) any compensation for work or labour done ,

(b) any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor ,

(c) generally any express or implied engagement, agreement or undertaking, to pay, or capable of resulting in the payment of money or money's worth , whether the payment is, as respects amount fixed or unliquidated as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies , as to mode of valuation capable of being ascertained by fixed rules or as matter of opinion

31. Where there have been mutual credits mutual debts or other mutual dealings, between a debtor against

Mutual credit and set off whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the and no more, shall be claimed or paid on either side respectively;

person shall not be entitled under this section to claim the benefit of any set off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor and available against him

32. With respect to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs, and the other matters referred to in the Second Schedule to this Act, the rules in that schedule shall be observed

Rules as to proof of debts

Priority of debts

33. (1) In the distribution of the property of a bankrupt there shall be paid in priority to all other debts—

- (a) All parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before that time, and all assessed taxes land tax property or income tax, assessed on the bankrupt up to the fifth day of April next before the date of the receiving order, and not exceeding in the whole one year's assessment,
- (b) All wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order not exceeding fifty pounds, [For the removal of doubts it is hereby declared that the priority by section thirty three of the principal Act to the wages or salary of any clerk or servant in respect of services rendered to a bankrupt during four months before the date of the receiving order not exceeding fifty pounds applies to any such wages or salary as aforesaid whether or not earned wholly or in part by way of commission B Act, 1926 S 2]
- (c) All wages of any labourer or workman not exceeding twenty-five pounds whether payable for time or for piece work in respect of services rendered to the bankrupt during two months before the date of receiving order Provided that, where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, the priority under this section shall extend to the whole of such sum or a part thereof as the Court may decide to be due under the contract proportionate to the time of service up to the date of receiving order
- (d) All amounts not exceeding in any individual case one hundred pounds due in respect of compensation under the Workmen's Compensation Act, 1906 the liability wherefor accrued before the date of the receiving order subject nevertheless to the provisions of section five of that Act, and

(c) All contributions payable under the National Insurance Act 1911, by the bankrupt, in respect of employed contributors or workmen in an insured trade during four months before the date of receiving order

(2) The foregoing debts shall rank equally between themselves and shall be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves

(3) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the foregoing debts shall be discharged forthwith so far as the property of the debtor is sufficient to meet them

(4) In the event of a landlord or other person distraining or having distrained on any goods or effects of a bankrupt within three months next before the date of the receiving order the debts to which the priority is given by this section shall be a first charge on goods or effects so distrained on, or the proceeds of the sale thereof

Provided that in respect of any money paid under any such charge the land-lord or other person shall have the same rights of priority as the person to whom such payment is made

(5) This section shall apply, in the case of a deceased person who dies insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order

(6) In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate, it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate

(7) Subject to the provisions of this Act, all debts proved in the bankruptcy shall be paid *pari passu*

(8) If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the bankruptcy

(9) Nothing in this section shall alter the effect of section three of the Partnership Act 1890 or shall prejudice the provisions of the Friendly Society Act 1896 or of section fourteen of the Trustee Savings Bank Act 1863 or the provisions of any enactment relating to deeds of arrangement respecting the payment of expenses incurred by the trustee under a deed of arrangement which has been avoided by the bankruptcy of the debtor

34. (1) Where at the time of the presentation of the bankruptcy petition any person is apprenticed or is an articled clerk to the bankrupt the adjudication of bankruptcy shall, if either the bank-

Preferential claim in case of apprenticeship

rupt or apprentice or clerk gives notice in writing to the trustee to that effect, be a complete discharge of the indenture of apprenticeship or articles of agreement, and if any money has been paid by or on behalf of the apprentice or clerk to the bankrupt as a fee, the trustee may, on the application of the apprentice or clerk or of some person on his behalf, pay such sum as the trustee, subject to an appeal to the Court thinks reasonable, out of the bankrupt's property, to or for the use of the apprentice or clerk, regard being had to the amount paid by him or on his behalf, and to the time during which he served with the bankrupt under the indenture or articles before the commencement of the bankruptcy, and to the other circumstances of the case

(2) Where it appears expedient to a trustee, he may, on the application of any apprentice or articulated clerk to the bankrupt, or any person acting on behalf of such apprentice or articulated clerk, instead of acting under the preceding provisions of this section, transfer the indenture of apprenticeship or articles of agreement to some other person

35. (1) The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy distrain upon the goods or effects of the bankrupt, for the rent due to him from the bankrupt with this limitation that, if such distress for rent be levied after the commencement of the bankruptcy, it shall be available only for six months rent accrued due prior to the date of the order of adjudication and shall not be available for rent payable in respect of any period subsequent to the date when the distress was levied, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available

(2) Where any goods of a debtor have been taken in execution the limit on the amount of rent which the party at whose suit the execution is sued out is liable to pay to the landlord under section one of the Landlord and Tenant Act 1709 or which the landlord is entitled to be paid under section one hundred and sixty of the County Courts Act 1888 shall, unless notice of claim for rent due has been served on the sheriff or bailiff or other officer levying the execution by or on behalf of the landlord before the commencement of the debtor's bankruptcy be six months rent instead of one year's rent, and the rights of the landlord under the said provisions shall not extend to any claim for rent payable in respect of any period subsequent to the date of such notice unless such notice was served as aforesaid before the commencement of the debtor's bankruptcy

(3) Nothing in the last preceding sub section shall be construed as imposing any liability on the Sheriff, bailiff or other officer levying the execution, or on the person at whose suit the execution was sued out, to account for any sum actually paid to the landlord by him before notice was served on him that a receiving order had been made against the

debtor, but the landlord shall be liable to pay to the trustee in the bankruptcy any sum he may have received from such sheriff bailiff, officer or person as aforesaid in excess of the amount which he was entitled to be paid, without prejudice however, to the right of the landlord to prove for the amount of such excess

36. (1) Where a married woman has been adjudged bankrupt, her husband shall not be entitled to claim any dividend as a creditor in respect of any money or other estate lent or entrusted by him to his wife for the purposes of her trade or business until all claims of the other creditors of his wife for valuable consideration in money or money's worth have been satisfied

(2) Where the husband of a married woman has been adjudged bankrupt any money or other estate of such woman lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise, shall be treated as assets of his estate and the wife shall not be entitled to claim any dividend as a creditor in respect of any such money or other estate until all claims of other creditors of her husband for valuable consideration in money or money's worth have been satisfied

Property available for Payment of Debts

37. (1) The bankruptcy of a debtor whether it takes place on the debtor's own petition or upon that of a creditor or creditors shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being committed on which a receiving order is made against him or if the bankrupt is proved to have committed more acts of bankruptcy than one to have relation back to and to commence at the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition but no bankruptcy petition receiving order or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor

(2) Where a receiving order is made against a judgment debtor in pursuance of section one hundred and seven of this Act the bankruptcy of the debtor shall be deemed to have relation back to and to commence at the time of the order or if the bankrupt is proved to have committed any previous act of bankruptcy then to have relation back to and to commence at the time of the first of the acts of bankruptcy proved to have been committed by the debtor within three months next preceding the date of the order

38. The property of the bankrupt divisible amongst his creditors and in this Act referred to as the property of the bankrupt shall not comprise the following particulars —

(1) Property held by the bankrupt on trust for any other person,

(2) The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole

But it shall comprise the following particulars —

- (a) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge, and
- (b) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge except the right of nomination to a vacant ecclesiastical benefice, and
- (c) All goods being at the commencement of the bankruptcy, in the possession order or disposition of the bankrupt, in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section

39. (1) Where a second or subsequent receiving order is made

Provisions as to second bankruptcy against a bankrupt, or when an order is made for the administration in bankruptcy of the estate of a deceased bankrupt, then for the purposes of any proceedings consequent upon any such order, the trustee in the last preceding bankruptcy shall be deemed to be a creditor in respect of any unsatisfied balance of the debts provable against the property of the bankrupt in that bankruptcy

(2) In the event of a second or subsequent receiving order made against a bankrupt being followed by an order adjudging him bankrupt, or in the event of an order being made for the administration in bankruptcy of the estate of a deceased bankrupt any property acquired by him since he was last adjudged bankrupt, which at the date when the subsequent petition was presented had not been distributed amongst the creditors in such last preceding bankruptcy, shall (subject to any disposition thereof made by the Official Receiver or trustee in that bankruptcy, without knowledge of the presentation of the subsequent petition, and subject to the provisions of section forty seven of this Act) vest in the trustee in the subsequent bankruptcy or administration in bankruptcy as the case may be

(3) Where the trustee in any bankruptcy receives notice of a subsequent petition in bankruptcy against the bankrupt or after his decease of a petition for the administration of his estate in bankruptcy, the trustee shall hold any property then in his possession which has been acquired

by the bankrupt since he was adjudged bankrupt until the subsequent petition has been disposed of, and, if on the subsequent petition an order of adjudication or an order for the administration of the estate in bankruptcy is made, he shall transfer all such property or the proceeds thereof (after deducting his costs and expenses) to the trustee in the subsequent bankruptcy or administration in bankruptcy, as the case may be.

Effect of Bankruptcy on antecedent and other Transactions

40. (1) Where a creditor has issued against the goods or lands of a debtor or has attached any debt due to him,

Restriction of rights of creditor under execution or attachment

shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

(2) For the purposes of this Act, an execution against goods is completed by seizure and sale, an attachment of a debt is completed by receipt of the debt, and an execution against land is completed by seizure, or in the case of an equitable interest, by the appointment of a receiver.

(3) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases, acquire a good title to them against the trustee in bankruptcy.

41. (1) Where any goods of a debtor are taken in execution and before the sale thereof, or the completion

Duties of sheriff as to goods taken in execution

of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the Official Receiver but the costs of the execution shall be a first charge on the goods or money so delivered, and the Official Receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying in charge.

(2) Where, under an execution in respect of a judgment for a sum exceeding twenty pounds the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and, if within that time notice is served on him of a bankruptcy petition having been presented by or against the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the

(2) The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole

But it shall comprise the following particulars —

- (a) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge, and
- (b) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge except the right of nomination to a vacant ecclesiastical benefice, and
- (c) All goods being at the commencement of the bankruptcy, in the possession or disposition of the bankrupt, in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section

39. (1) Where a second or subsequent receiving order is made against a bankrupt, or when an order is made for the administration in bankruptcy of the estate of a deceased bankrupt, then for the purposes of any proceedings consequent upon any such order, the trustee in the last preceding bankruptcy shall be deemed to be a creditor in respect of any unsatisfied balance of the debts provable against the property of the bankrupt in that bankruptcy

(2) In the event of a second or subsequent receiving order made against a bankrupt being followed by an order adjudging him bankrupt, or in the event of an order being made for the administration in bankruptcy of the estate of a deceased bankrupt, any property acquired by him since he was last adjudged bankrupt which at the date when the subsequent petition was presented had not been distributed amongst the creditors in such last preceding bankruptcy, shall (subject to any disposition thereof made by the Official Receiver or trustee in that bankruptcy, without knowledge of the presentation of the subsequent petition, and subject to the provisions of section forty seven of this Act) vest in the trustee in the subsequent bankruptcy or administration in bankruptcy as the case may be

(3) Where the trustee in any bankruptcy receives notice of a subsequent petition in bankruptcy against the bankrupt or after his decease of a petition for the administration of his estate in bankruptcy, the trustee shall hold any property then in his possession which has been acquired

by the bankrupt since he was adjudged bankrupt until the subsequent petition has been disposed of, and, if on the subsequent petition an order of adjudication or an order for the administration of the estate in bankruptcy is made, he shall transfer all such property or the proceeds thereof (after deducting his costs and expenses) to the trustee in the subsequent bankruptcy or administration in bankruptcy, as the case may be.)

Effect of Bankruptcy on antecedent and other Transactions

40. (1) Where a creditor has issued against the goods or lands of a debtor, or has attached any debt due to him,

Restriction of rights of creditor under execution or attachment

shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before

the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor

(2) For the purposes of this Act, an execution against goods is completed by seizure and sale, an attachment of a debt is completed by receipt of the debt, and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver

(3) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy and a person who purchases the goods in good faith under a sale by the sheriff shall, in all cases acquire a good title to them against the trustee in bankruptcy

41. (1) Where any goods of a debtor are taken in execution and before the sale thereof, or the completion

Duties of sheriff as to goods taken in execution

of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been

made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the Official Receiver but the costs of the execution shall be a first charge on the goods or money so delivered and the Official Receiver or trustee may sell the goods, or an adequate part thereof for the purpose of satisfying in charge

(2) Where, under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid and retain the balance for fourteen days, and, if within that time notice is served on him of a bankruptcy petition having been presented by or against the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice the sheriff shall pay it

balance to the Official Receiver or, as the case may be, to the trustee, who shall be entitled to retain it as against the execution creditor

42. (1) Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof

(2) Any covenant or contract made by any person (hereinafter called the settlor) in consideration of his or her marriage, either for the future payment of money for the benefit of the settlor's wife or husband, or children, or for the future settlement on or for the settlor's wife or husband or children, of property, wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of the settlor's wife or husband, shall, if the settlor is adjudged bankrupt and the covenant or contract has not been executed at the date of the commencement of his bankruptcy, be void against the trustee in the bankruptcy, except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy under or in respect of the covenant or contract, but any such claim to dividend shall be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied

(3) Any payment of money (not being payment of premiums on a policy of life assurance) or any transfer of property made by the settlor in pursuance of such a covenant or contract as aforesaid shall be void against the trustee in the settlor's bankruptcy, unless the persons to whom the payment or transfer was made prove either—

- (a) that the payment or transfer was made more than two years before the date of the commencement of the bankruptcy, or
- (b) that at the date of the payment or transfer the settlor was able to pay all his debts without the aid of the money so paid or the property so transferred, or
- (c) that the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a particular person named in the covenant or contract and was

made within three months after the money or property came into the possession or under the control of the settlor, but, in the event of any such payment or transfer being declared void the persons to whom it was made shall be entitled to claim for dividend under or in respect of the covenant or contract in like manner as if it had not been executed at the commencement of the bankruptcy

(4) Settlement shall, for the purposes of this section, include any conveyance or transfer of property

43. (1) Where a person engaged in any trade or business makes an assignment to any other person of his existing or future book debts or any class thereof and is subsequently adjudicated bankrupt the assignment shall be void against the trustee as regards any book debts which have not been paid at the commencement of the bankruptcy unless the assignment has been registered as if the assignment were a bill of sale given otherwise than by way of security for the payment of a sum of money and the provisions of the Bills of Sale Act 1878 with respect to the registration of bills of sale shall apply accordingly subject to such necessary modifications as may be made by rules under that Act

Avoidance of general assignments of book debts unless registered

Provided that nothing in this section shall have effect so as to render void any assignment of book debts due at the date of the assignment from specified debtors or of debts growing due under specified contracts or any assignment of book debts included in a transfer of a business made *bona fide* and for value or in any assignment of assets for the benefit of creditors generally

(2) For the purposes of this section assignment includes assignment by way of security and other charges on book debts

44. (1) Every conveyance or transfer of property or charge thereon made every payment made every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor or of any person in trust for any creditor with a view of giving such creditor or any surety or guarantor for the debt due to such creditor a preference over the other creditors shall if the person making taking paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making taking paying or suffering the same be deemed fraudulent and void as against the trustee in the bankruptcy

Avoidance of preference in certain cases

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt

(3) Where a receiving order is made against a judgment-debtor in pursuance of section one hundred and eight of this Act this section

balance to the Official Receiver or, as the case may be, to the trustee who shall be entitled to retain it as against the execution creditor

42. (1) Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement be void against the trustee in the bankruptcy, and shall if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof

(2) Any covenant or contract made by any person (hereinafter called the settlor) in consideration of his or her marriage, either for the future payment of money for the benefit of the settlor's wife or husband, or children, or for the future settlement on or for the settlor's wife or husband or children of property, wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of the settlor's wife or husband shall if the settlor is adjudged bankrupt and the covenant or contract has not been executed at the date of the commencement of his bankruptcy, be void against the trustee in the bankruptcy except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy under or in respect of the covenant or contract, but any such claim to dividend shall be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied

(3) Any payment of money (not being payment of premiums on a policy of life assurance) or any transfer of property made by the settlor in pursuance of such a covenant or contract as aforesaid shall be void against the trustee in the settlor's bankruptcy, unless the persons to whom the payment or transfer was made prove either—

- (a) that the payment or transfer was made more than two years before the date of the commencement of the bankruptcy, or
- (b) that at the date of the payment or transfer the settlor was able to pay all his debts without the aid of the money so paid or the property so transferred, or
- (c) that the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a particular person named in the covenant or contract and was

made within three months after the money or property came into the possession or under the control of the settlor, but, in the event of any such payment or transfer being declared void, the persons to whom it was made shall be entitled to claim for dividend under or in respect of the covenant or contract in like manner as if it had not been executed at the commencement of the bankruptcy

(4) Settlement shall for the purposes of this section, include any conveyance or transfer of property

43. (1) Where a person engaged in any trade or business makes an assignment to any other person of his existing or future book debts or any class thereof and is subsequently adjudicated bankrupt the assignment shall be void against the trustee as regards any book debts which have not been paid at the commencement of the bankruptcy unless the assignment has been registered as if the assignment were a bill of sale given otherwise than by way of security for the payment of a sum of money and the provisions of the Bills of Sale Act 1878 with respect to the registration of bills of sale shall apply accordingly subject to such necessary modifications as may be made by rules under that Act

Provided that nothing in this section shall have effect so as to render void any assignment of book debts due at the date of the assignment from specified debtors or of debts growing due under specified contracts or any assignment of book debts included in a transfer of a business made *bona fide* and for value or in any assignment of assets for the benefit of creditors generally

(2) For the purposes of this section assignment includes assignment by way of security and other charges on book debts

44. (1) Every conveyance or transfer of property or charge thereon made every payment made every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor or of any person in trust for any creditor with a view of giving such creditor or any surety or guarantor for the debt due to such creditor a preference over the other creditors shall if the person making taking paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making taking paying or suffering the same be deemed fraudulent and void as against the trustee in the bankruptcy

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt

(3) Where a receiving order is made against a judgment-debtor in pursuance of section one hundred and eight of this Act, this section

shall apply as if the debtor had been adjudged bankrupt on a bankruptcy petition presented at the date of the receiving order

45. Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements, assignments and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy—

Protection of bona fide
transactions without
notice

- (a) any payment by the bankrupt to any of his creditors,
- (b) Any payment or delivery to the bankrupt,
- (c) Any conveyance or assignment by the bankrupt for valuable consideration,
- (d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration

Provided that both the following conditions are complied with, namely—

- (i) that the payment, delivery, conveyance, assignment, contract, dealing or transaction, as the case may be, takes place before the date of the receiving order, and
- (ii) that the person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into has not at the time of the payment, delivery, conveyance assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time

(B A , 1926, s 4) Where any money or property of a bankrupt has, on or after the date of the receiving order but before notice thereof has been granted in the prescribed manner, been paid or transferred by a person having possession of it to some other person, and the payment or transfer is under the provisions of the principal Act void as against the trustee in the bankruptcy, then, if the person by whom the payment or transfer was made proves that when it was made he had not had notice of the receiving order, any right of recovery which the trustee may have against him in respect of the money or property shall not be enforced by any legal proceedings except where and in so far as the Court is satisfied that it is not reasonably practicable for the trustee to recover in respect of the money or property or of some part thereof from the person to whom it was paid or transferred

Recovery of property
transferred without know-
ledge of receiving order

46. A payment of money or delivery of property to a person subsequently adjudged bankrupt, or to a person claiming by assignment from him, shall, notwithstanding anything in this Act, be a good discharge to the person paying the money or delivering the property, if the payment or delivery is made before

Validity of certain
payments to bankrupt
and assignee

the actual date on which the receiving order is made and without notice of the presentation of a bankruptcy petition, and is either pursuant to the ordinary course of business or otherwise *bona fide*

47. All transactions by a bankrupt with any person dealing with him *bona fide* and for value, in respect of property, whether real or personal, acquired by the bankrupt after the adjudication shall, if completed before any intervention by the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction

This sub section shall apply to transactions with respect to real property completed before the first day of April nineteen hundred and fourteen in any case where there has not been any intervention by the trustee before that date

For the purposes of this sub section the receipt of any money security or negotiable instrument from or by the order or direction of a bankrupt by his banker and any payment and any delivery of any security or negotiable instrument made to or by the order or direction of, a bankrupt by his banker shall be deemed to be a transaction by the bankrupt with such banker dealing with him for value

(2) Where a banker has ascertained that a person having an account with him is an undischarged bankrupt then unless the banker is satisfied that the account is on behalf of some other person it shall be his duty forthwith to inform the trustee in the bankruptcy or the Board of Trade of the existence of the account and thereafter he shall not make any payments out of the account except under an order of the Court or in accordance with instructions from the trustee in the bankruptcy unless by the expiration of one month from the date of giving the information no instructions have been received from the trustee

Realisation of Property

48. (1) The trustee shall as soon as may be take possession of the deeds books and documents of the bankrupt and all other parts of his property capable of manual delivery

Possession of property
by trustee

(2) The trustee shall in relating to and for the purpose of acquiring or retaining possession of the property of the bankrupt be in the same position as if he were a receiver of the property appointed by the High Court and the Court may on his application enforce such acquisition or retention accordingly

(3) Where any part of the property of the bankrupt consists of stock shares in ships shares or any other property transferable in the books of any company office or person the trustee may exercise the right

transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt

(4) Where any part of the property of the bankrupt is of copyhold or customary tenure, or is any like property passing by surrender and admittance or in any similar manner, the trustee shall not be compellable to be admitted to the property, but may deal with it in the same manner as if it had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint, and any appointee of the trustee shall be admitted to or otherwise invested with the property accordingly

(5) Where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee

(6) Subject to the provisions of this Act with respect to property acquired by a bankrupt after adjudication, any treasurer or other officer, or any banker attorney, or agent of a bankrupt, shall pay and deliver to the trustee all money and securities in his possession or power, as such officer, banker, attorney or agent, which he is not by law entitled to retain as against the bankrupt or the trustee. If he does not, he shall be guilty of a contempt of Court, and may be punished accordingly on the application of the trustee

49. Any person acting under warrant of the Court may seize any part of the property of a bankrupt, or of a debtor against whom a receiving order has been made, in the custody or possession of the bankrupt or the debtor, or of any other person and with a view to such seizure may break open any house, building, or room of the bankrupt or the debtor, where the bankrupt or the debtor is supposed to be, or any building or receptacle of the bankrupt or the debtor where any of his property is supposed to be, and where the Court is satisfied that there is reason to believe that property of a bankrupt, or of a debtor against whom a receiving order has been made, is concealed in a house or place not belonging to him, the Court may, if it thinks fit, grant a search warrant to any constable or officer of the Court, who may execute it according to its tenor

50. (1) Where a bankrupt is a beneficed clergyman, the trustee may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee shall be sufficient authority for the granting of a sequestration without any writ or other proceeding, and the same shall accordingly be issued as on a writ of *levari facias* founded on a judgment against the bankrupt, and shall have priority over any other sequestration issued after the commencement of the bankruptcy in respect of a debt provable in the bankruptcy, except a sequestration issued before the date of the receiving order by or on behalf of a person who at the time of the issue thereof had not notice of an available act of bankruptcy committed by the bankrupt

(2) The bishop of the diocese in which the benefice is situate may, if he thinks fit, appoint to the bankrupt such or the like stipend as he might by law have appointed to a curate duly licensed to serve the benefice in case the bankrupt had been non-resident, and the sequestrator shall pay the sum so appointed out of the profits of the benefice to the bankrupt by quarterly instalments while he performs the duties of the benefice

(3) The sequestrator shall also pay out of the profits of the benefice the salary payable to any duly licensed curate of the church of the benefice in respect of duties performed by him as such during four months before the date of the receiving order, not exceeding fifty pounds

(4) Nothing in this section shall prejudice the operation of the Ecclesiastical Dilapidations Act, 1871, the Sequestration Act, 1871, or the Benefices Act, 1898, or any mortgage or charge duly created under any Act of Parliament before the commencement of the bankruptcy on the profits of the benefice

51. (1) Where a bankrupt is an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the trustee shall receive for distribution amongst the creditors so much of the bankrupt's pay or salary as the Court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct. Before making any order under this subsection the Court shall communicate with the chief officer of the department as to the amount, time, and manner of the payment to the trustee, and shall obtain the written consent of the chief officer to the terms of such payment

(2) Where a bankrupt is in receipt of a salary or income other than as aforesaid, or is entitled to any half pay, or pension, or to any compensation granted by the Treasury, the Court on the application of the trustee shall from time to time make such order as it thinks just for the payment of the salary, income, half pay pension, or compensation, or of any part thereof, to the trustee to be applied by him in such manner as the Court may direct

(3) Nothing in this section shall take away or abridge any power of the chief officer of any public department to dismiss a bankrupt or to declare the pension, half-pay, or compensation of any bankrupt to be forfeited

52. Where a married woman who has been adjudged bankrupt has separate property the income of which is subject to a restraint on anticipation the Court shall have power on the application of the trustee to order that during such time as the Court may order, the whole or some part of such income be paid to the

trustee for distribution amongst the creditors, and in the exercise of such power the Court shall have regard to the means of subsistence available for the woman and her children

- 53. (1)** Until a trustee is appointed, the Official Receiver shall be the trustee for the purposes of this Act, and, immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee

Vesting and transfer of property

- (2) On the appointment of a trustee, the property shall forthwith pass to and vest in the trustee appointed

(3) The property of the bankrupt shall pass from trustee to trustee including under that term the Official Receiver when he fills the office of trustee and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever

(4) The certificate of appointment of a trustee shall, for all purposes of any law in force in any part of the British dominions requiring registration, enrolment, or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property and may be registered enrolled and recorded accordingly

- 54. (1)** Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies

Disclaimer of onerous property

of unprofitable contracts or of any other property that is unsaleable, or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation thereto but subject to the provisions of this section, may, by writing signed by him at any time within twelve months after the first appointment of a trustee or such extended period as may be allowed by the Court disclaim the property

Provided that where any such property has not come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within twelve months after he has become aware thereof or such extended period as may be allowed by the Court

(2) The disclaimer shall operate to determine, as from the date of disclaimer the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person

(3) A trustee shall not be entitled to disclaim a lease without the leave of the Court except in any cases which may be prescribed by general rules and the Court may before or on granting such leave require such notices to be given to persons interested and impose such terms as a condition of granting leave and make such orders with respect to fixtures tenant's improvements and other matters arising out of the tenancy as the Court thinks just

(4) The trustee shall not be entitled to disclaim any property in pursuance of this section in any case where an application in writing has been made to the trustee by any person interested in the property requiring him to decide whether he will disclaim or not and the trustee has for a period of twenty-eight days after the receipt of the application or such extended period as may be allowed by the Court declined or neglected to give notice whether he disclaims the property or not and in the case of a contract if the trustee after such application as afore said does not within the said period or extended period disclaim the contract he shall be deemed to have adopted it

(5) The Court may on the application of any person who is as against the trustee entitled to the benefit or subject to the burden of a contract made with the bankrupt make an order rescinding the contract on such terms as to payment by or to either party of damages for the non performance of the contract or otherwise as to the Court may seem equitable and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy

(6) The Court may on application by any person either claiming any interest in any disclaimed property or under any liability not discharged by this Act in respect of any disclaimed property and on hearing such persons as it thinks fit make an order for the vesting of the property in or delivery thereof to any person entitled thereto or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid or a trustee for him and on such terms as the Court thinks just and on any such vesting order being made the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose

Provided that where the property disclaimed is of a leasehold nature the Court shall not make a vesting order in favour of any person claiming under the bankrupt whether as under lessee or as mortgagee by demise except upon the terms of making that person—

(a) subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed or

(b) if the Court thinks fit subject only to the same and obligations as if the lease had been assigned to that person at that date

and in either event (if the case so requires) as if the lease had comprised only the property comprised in the vesting order and any mort

gagagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there is no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in the lease freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt

(7) Where on the release removal resignation or death of a trustee in bankruptcy an Official Receiver is acting as trustee, he may disclaim any property which might be disclaimed by a trustee under the foregoing provisions, notwithstanding that the time prescribed by this section for such disclaimer has expired but such power of disclaimer shall be exercisable only within twelve months after the Official Receiver has become trustee in the circumstances aforesaid or has become aware of the existence of such property, whichever period may last expire

(8) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy

55. Subject to the provisions of this Act, the trustee may do all or any of the following things —

Powers of trustee to deal with property

(1) Sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt) by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels

(2) Give receipts for any money received by him which receipts shall effectually discharge the person paying the money from all responsibility in respect of the application thereof,

(3) prove rank claim and draw a dividend in respect of any debt due to the bankrupt

(4) Exercise any powers the capacity to exercise which is vested in the trustee under this Act and execute any powers of attorney, deeds and other instruments for the purpose carrying into effect the provisions of this Act,

(5) Deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it and sections fifty six to seventy three of the Fines and Recoveries Act, 1833 shall extend and apply to proceedings under this Act, as if those sections were herein re-enacted and in terms made applicable to those proceedings

Powers exercisable by trustee with permission of committee of inspection

56. The trustee may, with the permission of the committee of inspection, do all or any of the following things —

(1) Carry on the business of the bankrupt, so far as may be necessary for the beneficial winding-up of the same;

(2) Bring institute, or defend any action or other legal proceeding relating to the property of the bankrupt,

(3) Employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the Committee of Inspection;

(4) Accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time subject to such stipulations as to security and otherwise as the committee think fit,

(5) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts,

(6) Refer any dispute to arbitration, compromise any debts, claims, and liabilities whether present or future certain or contingent, liquidated or unliquidated subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt on the receipt of such sums payable at such times, and generally on such terms as may be agreed on,

(7) Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors in respect of any debts provable under the bankruptcy,

(8) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt made or capable of being made on the trustee by any person or by the trustee on any person

(9) Divide in its existing form amongst the creditors, according to its estimated value any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold

The permission given for the purposes of this section shall not be a general permission to do all or any of the above-mentioned things, but shall only be a permission to do the particular thing or things for which permission is sought in the specified case or cases

57. The trustee with the permission of the Committee of Inspection may appoint the bankrupt himself to super-

Power to allow bankrupt to manage property

intend the management of the property of the bankrupt or any part thereof or to carry on the trade (if any) of the bankrupt for the

benefit of his creditors and in any other respect to aid in administering the property, in such manner and on such terms as the trustee may direct

58. The trustee may from time to time with the permission of the Committee of Inspection make such allowance as he may think just to the bankrupt out of his property for the support of the bankrupt and his family or in consideration of his services if he is engaged in winding up his estate, but any such allowance may be reduced by the Court

Allowance to bankrupt for maintenance or service

59. Where any goods of a debtor against whom a receiving order has been made are held by any person by way of pledge, power, or other security, it shall be lawful for the Official Receiver or trustee, after giving notice in writing of his intention to do so, to inspect the goods, and where such notice has been given such person as aforesaid shall not be entitled to realise his security until he has given the trustee a reasonable opportunity of inspection of the goods and of exercising his right of redemption if he thinks fit to do so

Right of trustee to inspect goods pawned etc

60. Where the property of a bankrupt comprises the copyright in any work or any interest in such copyright and he is liable to pay to the author of the work royalties or a share of the profits in respect thereof the trustee shall not be entitled to sell, or authorise the sale of, any copies of the work, or to perform or authorise the performance of the work, except on the terms of paying to the author such sums by way of royalty or share of the profits as would have been payable by the bankrupt nor shall he, without the consent of the author or of the Court, be entitled to assign the right or transfer the interest or to grant any interest in the right by licence, except upon terms which will secure to the author payments by way of royalties or share of the profits at a rate not less than that which the bankrupt was liable to pay

Limitation of trustee's power in relation to copyright

61. Where the Official Receiver or trustee has seized or disposed of any goods chattels, property, or other effects in the possession or on the premises of a debtor against whom a receiving order has been made, without notice of any claim by any person in respect of the same, and it is thereafter made to appear that the said goods, chattels, property or other effects were not, at the date of the receiving order the property of the debtor, the Official Receiver or trustee shall not be personally liable for any loss or damage arising from such seizure or disposal sustained by any person claiming such property, nor for the costs of any proceedings taken to establish a claim thereto, unless the Court is of opinion that the Official Receiver or trustee has been guilty of negligence in respect of the same

Protection of official receivers and trustees from personal liability in certain cases

Distribution of Property

62. (1) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the trustee shall, with all convenient speed, declare and distribute dividends amongst the creditors who have proved their debts

Declaration and distribution of dividends

(2) The first dividend, if any, shall be declared and distributed within four months after the conclusion of the first meeting of creditors, unless the trustee satisfies the committee of inspection that there is sufficient reason for postponing the declaration to a later date

(3) Subsequent dividends shall in the absence of sufficient reason to the contrary, be declared and distributed at intervals of not more than six months

(4) Before declaring a dividend the trustee shall cause notice of his intention to do so to be gazetted in the prescribed manner, and shall also send reasonable notice thereof to each creditor mentioned in the bankrupt's statement who has not proved his debt

(5) When the trustee has declared a dividend he shall send to each creditor who has proved a notice showing the amount of the dividend and when and how it is payable and a statement in the prescribed form as to the particulars of the estate

63. (1) Where one partner of a firm is adjudged bankrupt a creditor to whom the bankrupt is indebted jointly with the other partners of the firm or any of them, shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors have received the full amount of their respective debts

Joint and separate dividends

(2) Where joint and separate properties are being administered dividends of the joint and separate properties shall unless otherwise directed by the Board of Trade on the application of any person interested be declared together and the expenses of and incidental to such dividends shall be fairly apportioned by the trustee between the joint and separate properties regard being had to the work done for and the benefit received by each property

64. (1) In the calculation and distribution of a dividend the trustee shall make provision for debts provable in bankruptcy appearing from the bankrupt's statements or otherwise to be due to persons resident in places so distant from the place where the trustee is acting that in the ordinary course of communication they have not had sufficient time to tender their proofs or to establish them if disputed and also for debts provable in bankruptcy the subject of claims not yet determined

Provision for creditors residing at a distance etc

(2) He shall also make provision for any disputed proof or claims and for the expenses necessary for the administration of the estate or otherwise

(3) Subject to the foregoing provisions, he shall distribute as dividend all money in hand

65. Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

66. (1) Where a debt has been proved, and the debt includes interest or any pecuniary consideration in lieu of interest, such interest or consideration shall for the purposes of dividend be calculated at a rate not exceeding five per centum per annum without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full.

(2) In dealing with the proof of the debt, the following rules shall be observed —

(a) Any account settled between the debtor and the creditor within three years preceding the date of the receiving order may be examined and if it appears that the settlement of the account forms substantially one transaction with any debt alleged to be due out of the debtor's estate (whether in the form of renewal of a loan or capitalisation of interest or ascertainment of loans or otherwise), the account may be re-opened and the whole transaction treated as one.

(b) Any payments made by the debtor to the creditor before the receiving order whether by way of bonus or otherwise and any sums received by the creditor before the receiving order from the realisation of any security for the debt shall notwithstanding any agreement to the contrary be appropriated to principal and interest in the proportion that the principal bears to the sum payable as interest at the agreed rate.

(c) Where the debt due is secured and the security is realised after the receiving order or the value thereof is assessed in the proof, the amount realised or assessed shall be appropriated to the satisfaction of principal and interest in the proportion that the principal bears to the sum payable as interest at the agreed rate.

67. (1) When the trustee has realised all the property of the bankrupt or so much thereof as can in the joint opinion of himself and of the Committee of Inspection be realised without needlessly

Final dividend

protracting the trusteeship, he shall declare a final dividend, but before so doing he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified to him but not established to his satisfaction that if they do not establish their claims to the satisfaction of the Court within a time limited by the notice he will proceed to make a final dividend without regard to their claims

(2) After the expiration of the time so limited if the Court on application by any such claimant grants him further time for establishing his claim then on the expiration of such further time the property of the bankrupt shall be divided among the creditors who have proved their debts without regard to the claims of any other persons

68. No action for a dividend shall lie against the trustee, but, if the trustee refuses to pay any dividend the Court may if it thinks fit order him to pay it and also to pay out of his own money interest thereon for the time that it is withheld and the costs of the application

69. The bankrupt shall be entitled to any surplus remaining after payment in full of his creditors with interest as by this Act provided and of the costs, charges and expenses of the proceedings under the bankruptcy petition

Right of bankrupt to surplus

PART III

(OFFICIAL RECEIVERS AND STAFF OF BOARD OF TRADE)

70 (1) There shall continue to be Official Receivers of debtors estates who shall be appointed and removable by and shall act under the general authority and directions of the Board of Trade but shall also be officers of the Courts to which they are respectively attached

Official receivers of debtors estates

(2) The number of Official Receivers and the districts to be assigned to them shall be fixed by the Board of Trade with the concurrence of the Treasury One person only shall be appointed for each district unless the Board of Trade with the concurrence of the Treasury otherwise direct but the same person may with the like concurrence be appointed to act for more than one district

() Where more than one Official Receiver is attached to the Court such one of them as is for the time being appointed by the Court for any particular estate shall be the Official Receiver for the purposes of that estate The Court shall distribute the receiverships of the particular estates among the Official Receivers in the prescribed manner

71. (1) The Board of Trade may by order direct that any of its officers mentioned in the order shall be capable of discharging the duties of any Official Receiver during any temporary vacancy in the office, or during the temporary absence of any Official Receiver through illness or otherwise

(2) The Board of Trade may on the application of an Official Receiver at any time by order nominate some fit person to be his deputy and to act for him for such time not exceeding two months as the order may fix and under such conditions as to remuneration and otherwise as may be prescribed

(3) The Board of Trade may by order, for reasons to be stated therein direct in any special case that any of its officers mentioned in the order shall be capable of discharging any portion of the duties of the Official Receiver for the performance of which it is in the opinion of the Board expedient that some person other than the Official Receiver be appointed provided that no additional expense be thereby incurred

72. (1) The duties of the Official Receiver shall have relation both to the conduct of the debtor and to the administration of his estate

(2) An Official Receiver may for the purpose of affidavits verifying proofs petitions or other proceedings under this Act administer oaths

(3) All provisions in this or any other Act referring to the trustee in a bankruptcy shall unless the context otherwise requires or the Act otherwise provides include the Official Receiver when acting as trustee

(4) The trustee shall supply the Official Receiver with such information and give him such access to and facilities for inspecting the bankrupt's books and documents and generally shall give him such aid as may be requisite for enabling the Official Receiver to perform his duties under this Act

73. As regards the debtor, it shall be the duty of the Official Receiver —

(a) To investigate the conduct of the debtor and to report to the Court stating whether there is reason to believe that the debtor has committed any act which constitutes a misdemeanour under this Act or any enactment repealed by this Act or which would justify the Court in refusing suspending or qualifying an order for his discharge

(b) To make such other reports concerning the conduct of the debtor as the Board of Trade may direct

(c) To take such part as may be directed by the Board of Trade in the public examination of the debtor

(d) To take such part and give such assistance in relation to the prosecution of any fraudulent debtor as the Board of Trade may direct

Duties of official receiver as to debtor's estate

74. (1) As regards the estate of a debtor it shall be the duty of the Official Receiver —

- (a) Pending the appointment of a trustee to act as interim receiver of the debtor's estate and where a special manager is not appointed as manager thereof
- (b) To authorise the special manager to raise money or make advances for the purposes of the estate in any case where, in the interests of the creditors it appears necessary so to do
- (c) To summon and preside at the first meeting of creditors,
- (d) To issue forms of proxy for use at the meetings of creditors,
- (e) To report to the creditors as to any proposal which the debtor may have made with respect to the mode of liquidating his affairs
- (f) To advertise the receiving order the date of the creditors' first meeting and of the debtors' public examination, and such other matters as it may be necessary to advertise,
- (g) To act as trustee during any vacancy in the office of trustee

(2) For the purpose of his duties as interim receiver or manager, the Official Receiver shall have the same powers as if he were a receiver and manager appointed by the High Court, but shall as far as practicable, consult the wishes of the creditors with respect to the management of the debtor's property and may for that purpose, if he thinks it advisable, summon meetings of the persons claiming to be creditors and shall not, unless the Board of Trade otherwise order, incur any expense beyond such as is requisite for the protection of the debtor's property or the disposing of perishable goods

Provided that, when the debtor cannot himself prepare a proper statement of affairs the official receiver may, subject to any prescribed conditions and at the expense of the estate, employ some person or persons to assist in the preparation of the statement of affairs

(3) Every official receiver shall account to the Board of Trade and pay over all moneys and deal with all securities in such manner as the Board from time to time direct

75. The Board of Trade may, with the approval of the Treasury as to number, appoint such officers, including official receivers, clerks, and servants as may be required by the Board for the execution of this Act, and may dismiss any such officer clerk or servant

Power for Board of Trade to appoint officers

PART IV

TRUSTEES IN BANKRUPTCY

Official Name

76. The official name of a trustee in bankruptcy shall be "the trustee of the property of a bankrupt" (inserting the name of the bankrupt), and by that name the trustee may, in any part of the British dominions or elsewhere hold property of every description, make contracts, sue and be sued, enter into any engagements binding on himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office

Appointment

77. (1) The creditors may, if they think fit, appoint more persons than one to the office of trustee, and when more persons than one are appointed they shall declare whether any act required or authorised to be done by the trustee is to be done by all or any one or more of such persons, but all such persons are in this Act included under the term "trustee", and shall be joint tenants of the property of the bankrupt

(2) The creditors may also appoint persons to act as trustees in succession in the event of one or more of the persons first named declining to accept the office of trustee, or failing to give security, or of the appointment of any such person not being certified by the Board of Trade

78. (1) If a vacancy occurs in the office of a trustee, the creditors in general meeting may appoint a person to fill the vacancy, and thereupon the same proceedings shall be taken as in the case of a first appointment

(2) The Official Receiver shall, on the requisition of any creditor, summon a meeting for the purpose of filling any such vacancy

(3) If the creditors do not, within three weeks after the occurrence of a vacancy, appoint a person to fill the vacancy, the Official Receivers shall report the matter to the Board of Trade and the Board may appoint a trustee, but in such case the creditors or committee of inspection shall have the same power of appointing a trustee in the place of the person so appointed by the Board of Trade as in the case of a first appointment

(4) During any vacancy in the office of trustee the Official Receiver shall act as trustee

Control over Trustee

79. (1) Subject to the provisions of this Act, the trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection and any directions so given by the creditors at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection

Discretionary powers of trustee and control thereof

(2) The trustee may from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors, by resolution, either at the meeting appointing the trustee or otherwise may direct, and it shall be lawful for any creditor with the concurrence of one sixth in value of the creditors (including himself) at any time to request the trustee or Official Receiver to call a meeting of the creditors, and the trustee or Official Receiver shall call such meeting accordingly within fourteen days

Provided that the person at whose instance the meeting is summoned shall deposit with the trustee or the Official Receiver, as the case may be, a sum sufficient to pay the costs of summoning the meeting, such sum to be repaid to him out of the estate if the creditors or the Court so direct

(3) The trustee may apply to the Court in manner prescribed for directions in relation to any particular matter arising under the bankruptcy

(4) Subject to the provisions of this Act, the trustee shall use his own discretion in the management of the estate and its distribution among the creditors

80. If the bankrupt or any of the creditors, or any other person, is aggrieved by any act or decision of the trustee, he may apply to the Court, and the Court may confirm reverse, or modify the act or decision complained of, and make such order in the premises as it thinks just

Appeal to Court against trustee

81. (1) The Board of Trade shall take cognizance of the conduct of trustees, and, in the event of any trustee not faithfully performing his duties, and duly observing all the requirements imposed on him by statute, rules, or otherwise, with respect to the performance, of his duties or in the event of any complaint being made to the Board by any creditor in regard thereto, the Board shall inquire into the matter and take such action thereon as may be expedient

Control of Board of Trade over trustees

(2) The Board may at any time require any trustee to answer any inquiry made by them in relation to any bankruptcy in which the trustee is engaged and may, if the Board think fit, apply to the Court to examine on oath the trustee or any other person concerning the bankruptcy

(3) The Board may also direct a local investigation to be made of the books and vouchers of the trustee

Remuneration and Costs

82. (1) Where the creditors appoint any person to be trustee of a debtor's estate, his remuneration (if any) shall be fixed by an ordinary resolution of the creditors, or, if the creditors so resolve, by the Committee of Inspection, and shall be in the nature of a commission or percentage, of which one part shall be payable on the amount realised by the trustee after deducting any sums paid to secured creditors out of the proceeds of their securities and the other part on the amount distributed in dividend

(2) If one fourth in number or value of the creditors dissent from the resolution or the bankrupt satisfies the Board of Trade that the remuneration is unnecessarily large, the Board of Trade shall fix the amount of the remuneration

(3) The resolution shall express what expenses the remuneration is to cover, and no liability shall attach to the bankrupt's estate, or to the creditors in respect of any expenses which the remuneration is expressed to cover

(4) Where a trustee acts without remuneration, he shall be allowed out of the bankrupt's estate such proper expenses incurred by him in or about the proceedings of the bankruptcy as the creditors may, with the sanction of the Board of Trade approve

(5) A trustee shall not, under any circumstances whatever, make any arrangement for or accept from the bankrupt, or any solicitor, auctioneer or any other person that may be employed about a bankruptcy, any gift, remuneration, or pecuniary or other consideration or benefit whatever beyond the remuneration fixed by the creditors and payable out of the estate, nor shall he make any arrangement for giving up, or give up any part of his remuneration, either as receiver, manager, or trustee to the bankrupt or any solicitor or other person that may be employed about a bankruptcy

83. (1) Where a trustee or manager receives remuneration for his services as such, no payment shall be allowed in his accounts in respect of the performance by any other person of the ordinary duties which are required by statute or rules to be performed by himself

Allowance and taxation
of costs

(2) Where the trustee is a solicitor, he may contract that the

remuneration for his services as trustee shall include all professional services

(3) All bills and charges of solicitors managers accountants auctioneers brokers and other persons not being trustees shall be taxed by the prescribed officer and no payments in respect thereof shall be allowed in the trustee's accounts without proof of such taxation having been made. The taxing master shall satisfy himself before passing such bills and charges that the employment of such solicitors and other persons in respect of the particular matters out of which such charges arise has been duly sanctioned. The sanction must be obtained before the employment except in cases of urgency and in such cases it must be shown that no undue delay took place in obtaining the sanction.

(4) Every such person shall on request by the trustee (which request the trustee shall make a sufficient time before declaring a dividend) deliver his bill of costs or charges to the proper officer for taxation and if he fails to do so within seven days after receipt of the request or such further time as the Court on application may grant the trustee shall declare and distribute the dividend without regard to any claim by him and thereupon any such claim shall be forfeited as well against the trustee personally as against the estate.

Receipts Payments Accounts Audit

84. The trustee or Official Receiver shall whenever required by any creditor so to do furnish and transmit to him by post a list of the creditors showing the amount of the debt due to each creditor and shall be entitled to charge for such list the sum of three pence per folio of seventy two words together with the cost of the postage thereof.

Trustee to furnish list of creditors

85. It shall be lawful for any creditor with the concurrence of one sixth of the creditors (including himself) at any time to call upon the trustee or Official Receiver to furnish and transmit to the creditors a statement of the accounts up to the date of such notice and the trustee shall upon receipt of such notice, furnish and transmit such statement of the accounts.

Trustee to furnish statement

Provided that the person at whose instance the accounts are furnished shall deposit with the trustee or Official Receiver, as the case may be a sum sufficient to pay the costs of furnishing and transmitting the accounts which sum shall be repaid to him out of the estate if the creditors or the Court so direct.

86. The trustee shall keep, in manner prescribed proper books in which he shall from time to time cause to be made entries or minutes of proceedings at meetings and of such other matters as may be prescribed and any creditor of the bankrupt

Books to be kept by trustee

may subject to the control of the Court, personally or by his agent, inspect any such books

87. (1) Every trustee in a bankruptcy shall from time to time, as may be prescribed, and not less than once in every year during the continuance of the bankruptcy, transmit to the Board of Trade a statement showing the proceedings in the bankruptcy up to the date of the statement containing the prescribed particulars and made out in the prescribed form.

(2) The Board of Trade shall cause the statements so transmitted to be examined and shall call the trustee to account for any misfeasance, neglect or omission which may appear on the said statements or in his accounts or otherwise and may require the trustee to make good any loss which the estate of the bankrupt may have sustained by the misfeasance neglect or omission

88. No trustee in a bankruptcy or under any composition or scheme of arrangement shall pay any sums received by him as trustee into his private banking account.

89. (1) The Bankruptcy Estates Account shall continue to be kept by the Board of Trade with the Bank of England and all moneys received by the Board of Trade in respect of proceedings under this Act shall be paid to that account.

(2) Every trustee in bankruptcy shall in such manner and at such times as the Board of Trade with the concurrence of the Treasury direct pay the money received by him to the Bankruptcy Estates Account at the Bank of England and the Board of Trade shall furnish him with a certificate of receipt of the money so paid

Provided that —

(a) if it appears to the Committee of Inspection that, for the purpose of carrying on the debtor's business or of obtaining advances or because of the probable amount of the cash balance or if the committee shall satisfy the Board of Trade that for any other reason it is for the advantage of the creditors that the trustee should have an account with a local bank, the Board of Trade shall, on the application of the Committee of Inspection, authorise the trustee to make his payments into and out of such local bank as the committee may select

(b) in any bankruptcy composition or scheme of arrangement in which the Official Receiver is acting as trustee, or in which a trustee is acting without a Committee of Inspection the Board of Trade may if for special reasons they think fit to do so upon the application of the Official Receiver or other trustee authorise the trustee to make his payments into and out of such local bank as the Board may direct.

(3) Where the trustee opens an account in a local bank, he shall open and keep it in the name of the debtor's estate, and any interest receivable in respect of the account shall be part of the assets of the estate, and the trustee shall make his payments into and out of the local bank in the prescribed manner.

(4) Subject to any general rules relating to small bankruptcies under section one hundred and twenty nine of this Act where the debtor at the date of the receiving order has an account at a bank such account shall not be withdrawn until the expiration of seven days from the day appointed for the first meeting of creditors unless the Board of Trade for the safety of the account, or other sufficient cause order the withdrawal of the account.

(5) If a trustee at any time retains for more than ten days a sum exceeding fifty pounds or such other amount as the Board of Trade in any particular case authorise him to retain then unless he explains the retention to the satisfaction of the Board of Trade he shall pay interest on the amount so retained in excess at the rate of twenty per centum per annum and shall have no claim to remuneration and may be removed from his office by the Board of Trade and shall be liable to pay any expenses occasioned by reason of his default.

(6) All payments out of money standing to the credit of the Board of Trade in the Bankruptcy Estates Account shall be made by the Bank of England in the prescribed manner.

90. (1) Whenever the cash balance standing to the credit of the Bankruptcy Estates Account is in excess of the amount which in the opinion of the Board of Trade is required for the time being to answer demands in respect of bankrupts estates the Board of Trade shall notify the same to the Treasury and shall pay over the same or any part thereof as the Treasury may require to the Treasury, to such account as the Treasury may direct and the Treasury may invest the said sums or any part thereof in Government securities to be placed to the credit of the said account.

(2) Whenever any part of the money so invested is in the opinion of the Board of Trade required to answer any demands in respect of bankrupts estates the Board of Trade shall notify to the Treasury the amount so required and the Treasury shall thereupon repay to the Board of Trade such sum as may be required to the credit of the Bankruptcy Estates Account and for that purpose may direct the sale of such part of the said securities as may be necessary.

(3) The Treasury out of any sums so paid to them may pay such sums as they consider necessary for defraying the expenses of providing office accommodation for any officer performing duties under this Act.

(4) If after any sum is so explained the Board of Trade notify to the Treasury that an amount is required to answer the demands in respect of bankrupts estates and the securities and moneys held by the Treasury on the account mentioned in this section are insufficient to pay the amount so required the Treasury shall for the purpose of meeting it

(4) The foregoing provisions of this section shall apply to an Official Receiver when he is, or is acting as, trustee, and when an Official Receiver has been released under this section, or any previous similar enactment, he shall continue to act as trustee for any subsequent purposes of the administration of the debtor's estate, but no liability shall attach to him personally by reason of his so continuing in respect of any act done, default made, or liability incurred before his release

(5) Where the trustee has not previously resigned or been removed, his release shall operate as a removal of him from his office, and thereupon the Official Receiver shall be the trustee

(6) Where, on the release of a trustee, an Official Receiver is, or is acting as, trustee, no liability shall attach to him personally in respect of any act done or default made, or liability incurred, by any prior trustee.

Office of trustee vacated by insolvency **94.** If a receiving order is made against a trustee, he shall thereby vacate his office of trustee

Removal of trustee **95. (1)** The creditors may, by ordinary resolution, at a meeting specially called for that purpose, of which seven days' notice has been given, remove a trustee appointed by them and may, at the same or any subsequent meeting, appoint another person to fill the vacancy as hereinafter provided in case of a vacancy in the office of trustee

(2) If the Board of Trade are of opinion—

(a) that a trustee appointed by the creditors is guilty of misconduct, or fails to perform his duties under this Act, or

(b) that his trusteeship is being needlessly protracted without any probable advantage to the creditors, or

(c) that he is by reason of lunacy, or continued sickness or absence, incapable of performing his duties, or

(d) that his connection with or relation to the bankrupt or his estate, or any particular creditor, might make it difficult for him to act with impartiality in the interest of the creditors generally, or

where in any other matter he has been removed from office on the ground of misconduct, the Board may remove him from his office, but, if the creditors by ordinary resolution disapprove of his removal he or they may appeal against it to the High Court

PART V

CONSTITUTION PROCEDURE AND POWERS OF COURT

Jurisdiction

Jurisdiction to be exercised by High Court and country courts

96. (1) The Courts having jurisdiction in bankruptcy shall be the High Court and the County Courts

(2) But the Lord Chancellor may from time to time, by order under his hand, exclude any County Court from having jurisdiction in bankruptcy, and for the purposes of bankruptcy jurisdiction may attach its district or any part thereof to the High Court, or to any other County Court or Courts, and may from time to time revoke or vary any order so made. The Lord Chancellor may, in like manner and subject to the like conditions, detach the district of any County Court or any part thereof from the district and jurisdiction of the High Court.

(3) The term "district," when used in this Act with reference to a County Court, means the district of the Court for the purposes of bankruptcy jurisdiction.

(4) A County Court which at the commencement of this Act is excluded from having bankruptcy jurisdiction shall continue to be so excluded until the Lord Chancellor otherwise orders, and the districts existing at the commencement of this Act shall subsist until the Lord Chancellor otherwise orders.

(5) Periodical sittings for the transaction of bankruptcy business by County Courts having jurisdiction in bankruptcy shall be held at such times and at such intervals as the Lord Chancellor prescribes for each such Court.

97. (1) Subject to general rules, and to orders of transfer made under the authority of the Supreme Court of Judicature Act, 1873, and Acts amending it, all matters in respect of which jurisdiction is given to the High Court by this Act shall be assigned to such division of the High Court as the Lord Chancellor may from time to time direct.

(2) All such matters shall, subject as aforesaid, be ordinarily transacted and disposed of by or under the direction of one of the Judges of the High Court, and the Lord Chancellor shall from time to time assign a judge for that purpose.

Provided that during vacation, or during the illness of the Judge so assigned, or during his absence, or for any other reasonable cause, such matters or any part thereof, may be transacted and disposed of by or under the directions of any Judge of the High Court named for that purpose by the Lord Chancellor.

(3) Subject to general rules, all bankruptcy matters shall be entitled, "In bankruptcy."

98. (1) If the debtor by or against whom a bankruptcy petition is presented has resided or carried on business within the London bankruptcy district as defined by this Act for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any County Court or is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition shall be presented to the High Court.

Transaction of bankruptcy business by special judge of High Court
36 & 37 Vict c 66

Petition where to be presented

(2) In any other case the petition shall be presented to the County Court for the district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition

(3) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court

99. The London bankruptcy district shall, for the purposes of this Act, comprise the city of London and the liberties thereof, and all such parts of the metropolis and other places as are situated within the district of any County Court described as a metropolitan County Court in the list contained in the Third Schedule to this Act

100. (1) Subject to the provisions of this Act every Court having original jurisdiction in bankruptcy shall have jurisdiction throughout England

(2) Any proceedings in bankruptcy may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one Court to another Court or may, by the like authority, be retained in the Court in which the proceedings were commenced, although it may not be the Court in which the proceedings ought to have been commenced

(3) If any question of law arises in any bankruptcy proceeding a County Court which all the parties to the proceeding desire, or which one of them and the Judge of the County Court desire, to have determined in the first instance in the High Court the Judge shall state the facts in the form of a special case for the opinion of the High Court The special case and the proceedings or such of them as may be required, shall be transmitted to the High Court for the purposes of the determination

101. Subject to the provisions of this Act and to general rules, the Judge of the High Court exercising jurisdiction in bankruptcy may exercise in chambers the whole or any part of his jurisdiction

102. (1) The registrars in bankruptcy of the High Court, and the registrars of County Courts having jurisdiction in bankruptcy, shall have the powers and jurisdiction in this section mentioned and any order made or act done by such registrars in the exercise of the said powers and jurisdiction shall be deemed the order or act of the Court

(2) Subject to general rules limiting the powers conferred by this section, a registrar shall have power—

(a) To hear bankruptcy petitions and to make receiving orders and adjudications thereon

(b) To hold the public examination of debtors

- (c) To grant orders of discharge where the application is not opposed,
- (d) To approve compositions or schemes of arrangement where they are not opposed,
- (e) To make interim orders in cases of urgency,
- (f) To make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in chambers,
- (g) To hear and determine any unopposed or *ex parte* application,
- (h) To summon and examine any person known or suspected to have in his possession effects of the debtor or to be indebted to him, or capable of giving information respecting the debtor, his dealings or property

(3) The registrars in bankruptcy of the High Court shall also have power to grant order of discharge and certificates of removal of disqualifications, and to approve compositions and schemes of arrangement

(4) A registrar shall not have power to commit for contempt of Court

(5) The Lord Chancellor may by order direct that any specified registrar of a County Court shall have and exercise all the powers of a registrar in bankruptcy of the High Court

103. A County Court shall, for the purposes of its bankruptcy jurisdiction in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High Court, and the orders of the Court may be enforced accordingly in manner prescribed

104. Where any moneys or funds have been received by an Official Receiver or by the Board of Trade, and the Court makes an order declaring that any person is entitled to such moneys or funds, the Board of Trade shall make an order for the payment thereof to that person

105. (1) Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case

Provided that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim, not

arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not, in the opinion of the judge, exceed in value two hundred pounds

(2) A Court having jurisdiction in bankruptcy under this Act shall not be subject to be restrained in the execution of its powers under this Act by the order of any other Court nor shall any appeal lie from its decisions except in manner directed by this Act

(3) If in any proceeding in bankruptcy there arises any question of fact which either of the parties desire to be tried before a jury instead of by the Court itself or which the Court thinks ought to be tried by a jury, the Court may if it thinks fit direct the trial to be had with a jury, and the trial may be had accordingly in the High Court in the same manner as if it were the trial of an issue of fact in an action and in the County Court in the manner in which jury trials in ordinary cases are by law held in that Court

(4) Where a receiving order has been made in the High Court under this Act, the Judge by whom such order was made shall have power if he sees fit without any further consent to order the transfer to such Judge of any action pending in any other division and brought or continued by or against the bankrupt

(5) Where default is made by a trustee debtor or other person in obeying any order or direction given by the Board of Trade or by an Official Receiver or any other officer of the Board of Trade under any power conferred by this Act or any enactment repealed by this Act the Court may on the application of the Board of Trade or an Official Receiver or other duly authorised person order such defaulting trustee debtor or person to comply with the order or direction so given and the Court may also if it thinks fit upon any such application make an immediate order for the committal of such defaulting trustee debtor or other person provided that the power given by this subsection shall be deemed to be in addition to and not in substitution for any other right or remedy in respect of such default

106. (1) If a peer of the United Kingdom or of any part of the United Kingdom or any other Lord of Parliament is adjudged bankrupt the Court shall cause the fact of his having been adjudged bankrupt to be certified as soon as may be to the Speaker of the House of Lords and the Clerk of the Crown in Chancery

(2) If a member of the House of Commons is adjudged bankrupt and the disqualifications arising from his bankruptcy are not removed within six months from the date of the order the Court shall immediately after the expiration of that time certify the same to the Speaker of the House of Commons

Judgment Debtors

107. (1) It shall be lawful for the Lord Chancellor by order to direct that the jurisdiction and powers under section five of the Debtors Act 1869 now vested in the High Court shall be assigned to and exercised by the Judge to whom bankruptcy business is assigned.

(2) It shall be lawful also for the Lord Chancellor in like manner to direct that the whole or any part of the said jurisdiction and powers shall be delegated to and exercised by the registrar in bankruptcy of the High Court.

(3) Any order made under this section may, at any time, in like manner be rescinded or varied.

(4) Where under section five of the Debtors Act 1869 application is made by a judgment creditor to a Court having bankruptcy jurisdiction for the committal of a judgment-debtor, the Court may, if it thinks fit decline to commit and in lieu thereof, with the consent of the judgment creditor and on payment by him of the prescribed fee make a receiving order against the debtor. In such case the judgment-debtor shall be deemed to have committed an act of bankruptcy at the time the order is made and the provisions of this Act except Part VII thereof shall apply as if for references to the presentation of a petition by or against a person there were substituted references to the making of such a receiving order.

(5) General rules under this Act may be made for the purpose of carrying into effect the provisions of the Debtors Act 1869.

Appeals

108. (1) Every Court having jurisdiction in bankruptcy under this Act may review, rescind or vary and order made by it under its bankruptcy jurisdiction.

(2) Orders in bankruptcy matters shall, at the instance of any person aggrieved be subject to appeal as follows —

(a) Where the order is made by a County Court an appeal shall lie to a Divisional Court of the High Court, of which the Judge to whom bankruptcy business is for the time being assigned shall for the purpose of hearing any such appeal be a member. The decision of the Divisional Court upon any such appeal shall be final and conclusive, unless in any case the Divisional Court or the Court of Appeal sees fit to give special leave to appeal therefrom to the Court of Appeal whose decision in such case shall be final and conclusive.

(b) Where the order (not being an order on appeal from a County Court) is made by the High Court an appeal shall lie to the Court of Appeal an appeal shall with the leave of the Court of Appeal but not otherwise, lie from the order of that Court to the House of Lords.

(c) No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal

(c) Where by this Act an appeal to the High Court is given against any decision of the Board of Trade, or of the Official Receiver, the appeal shall be brought within twenty-one days from the time when the decision appealed against is pronounced or made

Procedure

109. (1) Subject to the provisions of this Act and to general rules the costs of and incidental to any proceeding in Court under this Act shall be in the discretion of the Court. Provided that where any issue is tried by a jury the costs shall follow the event unless upon application made at the trial for good cause shown the Judge before whom such issue is tried otherwise orders

(2) The Court may at any time adjourn any proceedings before it upon such terms if any as it may think fit to impose

(3) The Court may at any time amend any written process or proceeding under this Act upon such terms if any as it may think fit to impose

(4) Where by this Act or by general rules the time for doing any act or thing is limited the Court may extend the time either before or after the expiration thereof upon such terms if any as the Court may think fit to impose

(5) Subject to general rules the Court may in any matter take the whole or any part of the evidence either *viva voce* or by interrogatories or upon affidavit or out of the United Kingdom by commission

110. Where two or more bankruptcy petitions are presented against the same debtor or against joint debtors the Court may consolidate the proceedings or any of them on such terms as the Court thinks fit

111. Where the petitioner does not proceed with due diligence on his petition the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of the petitioning creditor

112. If a debtor by or against whom a bankruptcy petition has been presented dies the proceedings in the matter shall unless the Court otherwise orders be continued as if he were alive

113. The Court may at any time for sufficient reason make an order staying the proceedings under a bankruptcy petition either altogether or for a limited time on such terms and subject to such conditions as the Court may think just

114. Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present a petition against any one or more partners of the firm without including the others

Power to present petition against one partner

115. Where there are more respondents than one to a petition, the Court may dismiss the petition as to one or more of them without prejudice to the effect of the petition as against the other or others of them

Power to dismiss petition against some respondents only

116. Where a receiving order has been made on a bankruptcy petition by or against one member of a partnership, any other bankruptcy petition by or against a member of the same partnership shall be filed in or transferred to the Court in which the first mentioned petition is in course of prosecution, and, unless the Court otherwise directs, the same trustee or receiver shall be appointed as may have been appointed in respect of the property of the first mentioned member of the partnership and the Court may give such directions for consolidating the proceedings under the petitions as it thinks just

Property of partners to be vested in same trustee

117. Where a member of a partnership is adjudged bankrupt, the Court may authorise the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner, and any release by such partner of the debt or demand to which the action relates shall be void, but notice of the application for authority to commence the action shall be given to him and he may show cause against it, and on his application the Court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the Court directs

Actions by trustee and bankrupt's partners

118. Where a bankrupt is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract without the joinder of the bankrupt

Actions on joint contracts

119. Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm but in such case the Court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner and verified on oath or otherwise, as the Court may direct

Proceedings in partnership name

Officers

120. (1) No registrar or other officer attached to any Court having jurisdiction in bankruptcy shall during his continuance in office be capable of being elected or sitting as a member of the House of Commons

Disabilities of officers

(2) No registrar or Official Receiver or other officer attached to any such Court shall during his continuance in office either directly or indirectly, by himself his clerk or partner act as solicitor in any proceeding in bankruptcy or in any prosecution of a debtor by order of the Court, and, if he does so act he shall be liable to be dismissed from office

Provided that nothing in this section shall affect the right of any registrar or officer appointed before the twenty fifth day of August eighteen hundred and eighty three to act as solicitor, by himself his clerk, or partner to the extent permitted by section sixty nine of the Bankruptcy Act 1869

Orders and Warrants of Court

121. Any order made by a Court having jurisdiction in bankruptcy in England under the Act or any enactment repealed by this Act shall be enforced in Scotland and Ireland in the Courts having jurisdiction in bankruptcy in those parts of the United Kingdom respectively in the same manner in all respects as if the order had been made by the Court hereby required to enforce it and in like manner any order made by a Court having jurisdiction in bankruptcy in Scotland shall be enforced in England and Ireland and any order made by a Court having jurisdiction in bankruptcy in Ireland shall be enforced in England and Scotland by the Courts respectively having jurisdiction in bankruptcy in the part of the United Kingdom where the orders may require to be enforced and in the same manner in all respects as if the order had been made by the Court required to enforce it in a case of bankruptcy within its own jurisdiction

122. The High Court the County Courts the Courts having jurisdiction in bankruptcy in Scotland and Ireland and every British Court elsewhere having jurisdiction in bankruptcy or insolvency and the officers of those Courts respectively shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy and an order of the Court seeking aid with a request to another of the said Courts shall be deemed sufficient to enable the latter Court to exercise in regard to the matters directed by the order such jurisdiction as either the Court which made the request or the Court to which the request is made could exercise in regard to similar matters within their respective jurisdictions

Courts to be auxiliary to each other

114. Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present a petition against any one or more partners of the firm without including the others

Power to present petition against one partner

115. Where there are more respondents than one to a petition, the Court may dismiss the petition as to one or more of them, without prejudice to the effect of the petition as against the other or others of them

Power to dismiss petition against some respondents only

116. Where a receiving order has been made on a bankruptcy petition by or against one member of a partnership, any other bankruptcy petition by or against a member of the same partnership shall be filed in or transferred to the Court in which the first-mentioned petition is in course of prosecution and, unless the Court otherwise directs the same trustee or receiver shall be appointed as may have been appointed in respect of the property of the first mentioned member of the partnership, and the Court may give such directions for consolidating the proceedings under the petitions as it thinks just

Property of partners to be vested in same trustee

117. Where a member of a partnership is adjudged bankrupt, the Court may authorise the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner, and any release by such partner of the debt or demand to which the action relates shall be void, but notice of the application for authority to commence the action shall be given to him, and he may show cause against it, and on his application the Court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and if he does not claim any benefit therefrom, he shall be indemnified against costs in respect thereof as the Court directs

Actions by trustee and bankrupt's partners

118. Where a bankrupt is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract without the joinder of the bankrupt

Actions on joint contracts

119. Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm, but in such case the Court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner and verified on oath or otherwise, as the Court may direct

Proceedings in partnership name

Officers

120. (1) No registrar or other officer attached to any Court having jurisdiction in bankruptcy shall during his continuance in office be capable of being elected or sitting as a member of the House of Commons

Disabilities of officers

(2) No registrar or Official Receiver or other officer attached to any such Court shall during his continuance in office either directly or indirectly, by himself his clerk or partner act as solicitor in any proceeding in bankruptcy or in any prosecution of a debtor by order of the Court, and if he does so act he shall be liable to be dismissed from office

Provided that nothing in this section shall affect the right of any registrar or officer appointed before the twenty fifth day of August eighteen hundred and eighty three to act as solicitor by himself his clerk or partner to the extent permitted by section sixty nine of the Bankruptcy Act 1869

Orders and Warrants of Court

121. Any order made by a Court having jurisdiction in bankruptcy in England under the Act or any enactment repealed by this Act shall be enforced in Scotland and Ireland in the Courts having jurisdiction in bankruptcy in those parts of the United Kingdom respectively in the same manner in all respects as if the order had been made by the Court hereby required to enforce it and in like manner any order made by a Court having jurisdiction in bankruptcy in Scotland shall be enforced in England and Ireland and any order made by a Court having jurisdiction in bankruptcy in Ireland shall be enforced in England and Scotland by the Courts respectively having jurisdiction in bankruptcy in the part of the United Kingdom where the orders may require to be enforced and in the same manner in all respects as if the order had been made by the Court required to enforce it in a case of bankruptcy within its own jurisdiction

Enforcement of orders of Courts throughout United Kingdom

122 The High Court the County Courts the Courts having jurisdiction in bankruptcy in Scotland and Ireland and every British Court elsewhere having jurisdiction in bankruptcy or insolvency and the officers of those Courts respectively shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy and an order of the Court seeking aid with a request to another of the said Courts shall be deemed sufficient to enable the latter Court to exercise in regard to the matters directed by the order such jurisdiction as either the Court which made the request or the Court to which the request is made could exercise in regard to similar matters within their respective jurisdictions

Courts to be auxiliary to each other

123. (1) Any warrant of a Court having jurisdiction in bankruptcy in England may be enforced in Scotland, Ireland, the Isle of Man, the Channel Islands, and elsewhere in His Majesty's dominions, in the same manner and subject to the same privileges in and subject to which a warrant issued by any justice of the peace against a person for an indictable offence against the laws of England, may be executed in those parts of His Majesty's dominions respectively, in pursuance of the Acts of Parliament in that behalf

(2) A search warrant issued by a Court having jurisdiction in bankruptcy for the discovery of any property of a debtor may be executed in manner prescribed or in the same manner and subject to the same privileges in and subject to which a search warrant for property supposed to be stolen may be executed according to law

124. Where the Court commits any person to prison, the commitment may be to such convenient prison as the Court thinks expedient, and, if the gaoler of any prison refuses to receive any prisoner so committed, he shall be liable for every such refusal to a fine not exceeding one hundred pounds

PART VI

SUPPLEMENTAL PROVISIONS

Application of Act

125. (1) Every married woman who carried on a trade or business whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a feme sole

(2) Where a married woman carries on a trade or business and a final judgment or order for any amount has been obtained against her, whether or not expressed to be payable out of her separate property, that judgment or order shall be available for bankruptcy proceedings against her by a bankruptcy notice as though she were personally bound to pay the judgment debt or sum ordered to be paid

126. A receiving order shall not be made against any corporation or against any partnership or association or company registered under the Companies (Consolidation) Act 1908, or any enactment repealed by that Act

Exclusion of companies
8 Edw 7 c 69

127. Subject to such modifications as may be made by general rules under this Act, the provisions of this Act shall apply to limited partnerships in like manner as if limited partnerships were ordinary partnerships, and, on all the general

Application to limited
partnerships

partners of a limited partnership being adjudged bankrupt the assets of the limited partnership shall vest in the trustee

128 If a person having privilege of Parliament commits an act of bankruptcy he may be dealt with under this act in like manner as if he had not such privilege

129 Where a petition is presented by or against a debtor of the Court is satisfied by affidavit or otherwise or the Official Receiver reports to the Court that the property of the debtor is not likely to exceed in value three hundred pounds the Court may make an order that the debtor's estate be administered in a summary manner and thereupon the provisions of this Act shall be subject to the following modifications

(i) If the debtor is adjudged bankrupt the Official Receiver shall be the trustee in the bankruptcy

(ii) There shall be no committee of inspection but the Official Receiver may do with the permission of the Board of Trade all things which may be done by the trustee with the permission of the committee of inspection

(iii) Such of the modifications may be made in the provisions of this Act as may be prescribed by general rules with the view of saving expense and simplifying procedure but nothing in this section shall permit the modification of the provisions of this Act relating to the examination or discharge of the debtor

Provided that the creditor may at any time by special resolution resolve that some person other than the Official Receiver be appointed trustee in the bankruptcy and thereupon the bankruptcy shall proceed as if an order for summary administration had not been made

130 (1) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against the debtor had he been alive may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor according to the law of bankruptcy

(2) Upon the prescribed notice being given to the representative of the deceased debtor his Court may in the prescribed manner upon proof of the petitioner's debt unsatisfied by the deceased debtor make an order for the payment of the debts owing by the deceased debtor in administration in bankruptcy if he had died and upon cause shown dismiss the petition with or without costs

(3) A petition for administration under this section shall not be presented to the Court after proceedings have been commenced in any Court of justice for the administration of the deceased debtor's

estate, but that the Court may, when satisfied that the estate is sufficient to pay its debts, transfer the proceedings to the Court exercising jurisdiction in bankruptcy, and thereupon the last mentioned Court may, in the prescribed manner, make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor

(4) Upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the Official Receiver of the Court, as trustee thereof, and he shall forthwith proceed to realise and distribute it in accordance with the provisions of this Act

Provided that the creditors shall have the same powers as to appointment of trustees and committees of inspection as they have in other cases where the estate of a debtor is being administered or dealt with in bankruptcy, and the provisions of this Act, relating to trustees and committees of inspection, shall apply to trustees and committees of inspection appointed under the power so conferred

If no committee of inspection is appointed, any act or thing or any direction or permission which might have been done or given by a committee of inspection may be done or given by the Board of Trade

(5) With the modifications hereinafter mentioned, all the provisions of Part II of this Act (relating to the administration of the property of a bankrupt) and, subject to any modification that may be made therein by general rules under sub-section eleven of this section, the following provisions, namely, section twenty five of this Act (which relates to inquiries as to the debtor's conduct, dealings, and property); section eighty-three of this Act (which relates to the costs of trustees, managers, and other persons), section one hundred and twenty nine of this Act (which relates to the summary administration of small estates) and sub-section four of section ninety three of this Act so far as it relates to the effect of the release of Official Receivers, shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act, and sub-section one of section thirty five of this Act shall apply as if for the reference to an order of adjudication there were substituted a reference to an administration order under this section

(6) In the administration of the property of the deceased debtor under an order of administration, the Official Receiver or trustee shall have regard to any claim by the legal personal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate, and such claims shall be deemed a preferential debt under the order, and shall, notwithstanding anything to the contrary in the provisions of this Act relating to the priority of other debts, be payable in full, out of the debtor's estate, in priority to all other debts

(7) If, on the administration of a deceased debtor's estate, any surplus remains in the hands of the Official Receiver or trustee, after payment in full of all the debts due from the debtor, together with the costs of the administration and interest as provided by this Act in case of

bankruptcy, such surplus shall be paid over to the legal personal representative before the date of the order for being dealt with in such other manner as may be prescribed

(8) Notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition under this section shall in the event of an order for administration being made thereon, be deemed to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal personal representative shall operate as a discharge to him as between himself and the Official Receiver or trustee, save as aforesaid nothing in this section shall invalidate any payment made or any act or thing done in good faith by the legal personal representative before the date of the order for administration

(9) A petition for the administration of the estate of a deceased debtor under this section may be presented by the legal personal representative of the debtor and, where a petition is so presented by such a representative, this section shall apply subject to such modifications as may be prescribed by general rules made under sub-section eleven of this section

(10) Unless the context otherwise requires Court, in this section, means the Court within the jurisdiction of which the debtor resided or carried on business for the greater part of the six months immediately prior to his decease, creditor means one or more creditors qualified to present a bankruptcy petition as in this Act provided

(11) General rules for carrying into effect the provisions of this section may be made in the same manner and to the like effect and extent as in bankruptcy

131. (1) The enactments set out in the Fourth Schedule to this Act and re-enacted in the manner therein appearing, shall apply as respects debtors who have been adjudged bankrupt or whose affairs have been liquidated by arrangement under the Bankruptcy Act, 1869 or any previous Bankruptcy Act, and as respects proceedings under any such Act outstanding at the commencement of this Act

(2) Save as aforesaid nothing in this Act shall affect such proceedings aforesaid, but they shall continue, and the provisions of the Bankruptcy Act, 1869, or any previous Bankruptcy Acts and any rules, orders and tables of fees made thereunder which were applicable to the case immediately before the commencement of this Act shall continue to apply thereto as if this Act had not been passed

General Rules

132. (1) The Lord Chancellor may, with the concurrence of the President of the Board of Trade make general rules for carrying into effect the objects of this Act

Power to make general rules

Provided that the general rules so made shall not extend the jurisdiction of the Court

(2) All general rules made under this section shall be laid before Parliament within three weeks after they are made if Parliament is then sitting, and, if Parliament is not then sitting, within three weeks after the beginning of the then next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act

Fees, Salaries, Expenditure, and Returns

133. (1) The Lord Chancellor may, with the sanction of the Treasury, prescribe a scale of fees and percentages to be charged for or in respect of proceedings under this Act; and the Treasury shall direct by whom and in what manner they are to be collected and accounted for, and to what account they shall be paid

Fees and remuneration

(2) The Board of Trade, with the concurrence of the Treasury, shall direct whether any and what remuneration is to be allowed to any officer of, or person attached to, the Board of Trade, performing any duties under this Act, and may vary, increase, or diminish such remuneration, as they may think fit

134. The Lord Chancellor, with the concurrence of the Treasury, shall direct whether any and what remuneration is to be allowed to any person (other than an officer of the Board of Trade) performing any duties under this Act, and may vary, increase, or diminish such remuneration, as he may think fit

Judicial salaries, &c

135. (Repealed by 16 & 17 Geo 5, c 9)

136. The registrars and other officers of the Courts acting in bankruptcy shall make to the Board of Trade such returns of the business of their respective Courts and offices, at such times and in such manner and form as may be prescribed, and from such returns the Board of Trade shall cause books to be prepared which shall, under the regulations of the Board, be open for public information and searches

Returns by bankruptcy officers

The Board of Trade shall also cause a general annual report of all matters, judicial and financial, within this Act, to be prepared and laid before both Houses of Parliament

Evidence

137. (1) A copy of the *London Gazette* containing any notice inserted therein in pursuance of this Act, shall be evidence of the facts stated in the notice

Gazette to evidence

(2) The production of a copy of the *London Gazette* containing any notice of a Receiving Order, or of an order adjudging a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date

138. (1) A minute of proceedings at a meeting of creditors under this Act, signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof

Evidence of proceedings at meetings of creditors this Act, signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof

(2) Until the contrary is proved, every meeting of creditors in respect of its proceedings whereof a minute has been so signed shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had

139. Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate made by any Court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit, or document made or used in the course of any bankruptcy proceedings or other proceedings had under this Act, shall, if it appears to be sealed with the seal of any Court having jurisdiction in bankruptcy, or purports to be signed by any Judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever

140. Subject to general rules, any affidavit to be used in a Bankruptcy Court may be sworn before any person authorised to administer oaths in the High Court, or in the Court of Chancery of the County Palatine of Lancaster, or before any registrar of a Bankruptcy Court, or before any officer of a Bankruptcy Court authorised in writing in that behalf by the Judge of the Court or before a justice of the peace for the county or place where it is sworn, or, in the case of a person residing in Scotland or in Ireland, before a Judge ordinary, magistrate, or justice of the peace, or, in the case of a person who is out of the United Kingdom, before a magistrate or justice of the peace or other person qualified to administer oaths in the country where he resides (he being certified to be a magistrate or justice of the peace or qualified as aforesaid, by a British minister or British Consul or by a notary public)

141. In the case of the death of the debtor or his wife, or of a witness whose evidence has been received by any Court in any proceeding under this Act, the deposition of the person so deceased purporting to be sealed with the seal of the Court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to

142. Every Court having jurisdiction in bankruptcy under this Act shall have a seal describing the Court in such manner as may be directed by order of the Lord Chancellor, and judicial notice shall be taken of the seal and of the signature of the Judge or registrar of any such Court, in all legal proceedings

Bankruptcy Courts to have seals

143. A certificate of the Board of Trade that a person has been appointed trustee under this Act shall be conclusive evidence of his appointment

144. (1) All documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorised in that behalf by the President of the Board, shall be received in evidence, and deemed to be such orders or certificates without further proof unless the contrary is shown

(2) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade shall be conclusive evidence of the fact so certified

Miscellaneous

145. (1) Where by this Act any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceeding, then in the computation of that limited time the same shall be taken as exclusive of the day of that date or of the happening of that event, and as commencing at the beginning of the next following day, and the act or proceeding shall be done or taken at latest on the last day of that limited time as so computed, unless the last day is a Sunday, Christmas Day, Good Friday, or Monday or Tuesday in Easter Week or a day appointed for public fast, humiliation or thanksgiving or a day on which the Court does not sit, in which case any act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards which is not one of the days in this section specified

(2) Where by this Act any act or proceeding is directed to be done or taken on a certain day then, if that day happens to be one of the days in this section specified the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards which is not one of the days in this section specified

146. All notices and other documents for the service of which no special mode is directed may be sent by post to the last known address of the person to be served therewith

147. (1) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court

(2) No defect or irregularity in the appointment or election of a receiver, trustee, or member of a committee of inspection shall vitiate any act done by him in good faith

148. Every deed, conveyance, assignment, surrender, admission or other assurance relating solely to freehold, leasehold, copyhold or customary property, or to any mortgage charge or other incumbrance on, or any estate, right or interest in, any real or personal property which is part of the estate of any bankrupt, and which, after the execution of the deed, conveyance, assignment, surrender admission or other assurance either at law or in equity, is or remains the estate of the bankrupt or of the trustee under the bankruptcy, and every power of attorney proxy paper, writ, order, certificate, affidavit, bond or other instrument or writing relating solely to the property of any bankrupt, or to any proceeding under any bankruptcy, shall be exempt from stamp duty, except in respect of fees under this Act

149. For all or any of the purposes of this Act, a corporation may act by any of its officers authorised in that behalf under the seal of the corporation, a firm may act by any of its members, and a lunatic may act by his committee or *curator bonis*

150. (1) Where in any Act instrument, or proceeding, passed, executed, or taken before the commencement of this Act, mention is made of a commission of bankruptcy or fiat in bankruptcy the same shall be construed, with reference to the proceedings under a bankruptcy petition, as if a commission of or a fiat in bankruptcy had been actually issued at the time of the presentation of such petition

(2) Where by any Act or instrument reference is made to the Bankruptcy Act, 1869, or to any enactment repealed by this Act, that Act or instrument shall, unless the context otherwise requires, be construed and have effect as if this Act or the corresponding provision (if any) of this Act were therein referred to

151. Save as provided in this Act, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge shall bind the Crown

152. Nothing in this Act shall take away or affect any right of audience that any person may have had at the commencement of this Act

Unclaimed Funds or Dividends

153. (1) Where the trustees, under any bankruptcy composition or scheme, pursuant to this Act or any enactment repealed by this Act, has under his control any unclaimed dividend which has remained unclaimed for more than six months, or where, after making a final dividend, he has in his hands or under his control any unclaimed or undistributed money arising from the property of the debtor, he shall forthwith pay it to the Bankruptcy Estates Account at the Bank of England. The Board of Trade shall furnish him with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof.

(2) Where any unclaimed or undistributed funds or dividends in the hands or under the control of any trustee or other person empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the Fifth Schedule to this Act, or any petition, resolution, deed or other proceeding under or in pursuance of any such Act, have remained or remain unclaimed or undistributed for six months after they became claimable or distributable, or in any other case for two years after the receipt thereof by such trustee or other person, it shall be the duty of such trustee or other person forthwith to pay them to the Bankruptcy Estates Account at the Bank of England. The Board of Trade shall furnish the trustee or other person with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof.

The Board of Trade may at any time order any such trustee or other person to submit to them an account verified by affidavit of the sums received and paid by him under or in pursuance of any such petition, resolution, deed or other proceeding as aforesaid, and may direct and enforce an audit of the account.

The Board of Trade with the concurrence of the Treasury, may from time to time appoint a person to collect and get in all such unclaimed or distributed funds or dividends, and for the purposes of this section any court having jurisdiction in bankruptcy shall have and, at the instance of the person so appointed or of the Board of Trade, may exercise, all the powers conferred by this Act with respect to the discovery and realisation of the property of a debtor, and the provisions of Part I of this Act with respect thereto shall, with any necessary modifications, apply to proceedings under this section.

(3) The provisions of this section shall not, except as expressly declared herein deprive any person of any larger or other right or remedy to which he may be entitled against such trustee or other person.

(4) Any person claiming to be entitled to any moneys paid into the Bankruptcy Estates Account, pursuant to this section, may apply to the Board of Trade for payment to him of the same, and the Board of Trade,

if satisfied that the person claiming is entitled, shall make an order for the payment to such person of the sum due

Any person dissatisfied with the decision of the Board of Trade in respect of his claim may appeal to the High Court

PART VII

BANKRUPTCY OFFENCES

154. (1) Any person who has been adjudged bankrupt or in respect of whose estate a Receiving order has been made shall in each of the cases following be guilty of a misdemeanour

Fraudulent debtors

- (a) If he does not to the best of his knowledge and belief fully and truly discover to the trustee all his property, real and personal, and how and to whom and for what consideration and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any) or laid out in the ordinary expense of his family, unless he proves that he had no intent to defraud,
- (b) If he does not deliver up to the trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless he proves that he had no intent to defraud,
- (c) If he does not deliver up to the trustee, or as he directs, all books, documents, papers, and writings in his custody or under his control relating to his property or affairs, unless he proves that he had no intent to defraud,
- (d) If, after the presentation of a bankruptcy petition by or against him or within (twelve) months next before such presentation, he conceals any part of his property to the value of ten pounds or upwards or conceals any debt due to or from him unless he proves that he had no intent to defraud
- (e) If, after the presentation of a bankruptcy petition by or against him or within (twelve) months next before such presentation he fraudulently removes any part of his property to the value of ten pounds or upwards
- (f) If he make any material omission in any statement relating to his affairs unless he proves that he had no intent to defraud
- (g) If knowing or believing that a false debt has been proved by any person under the bankruptcy he fails for the period of a month to inform the trustee thereof
- (h) If, after the presentation of a bankruptcy petition by or against him, he prevents the production of any book, document,

Unclaimed Funds or Dividends

- 153.** (1) Where the trustee, under any bankruptcy composition or scheme, pursuant to this Act or any enactment repealed by this Act, has under his control any unclaimed dividend which has remained unclaimed for more than six months, or where, after making a final dividend, he has in his hands or under his control any

Unclaimed and undistributed dividends or funds under this and former Acts

unclaimed or undistributed money arising from the property of the debtor, he shall forthwith pay it to the Bankruptcy Estates Account at the Bank of England. The Board of Trade shall furnish him with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof.

(2) Where any unclaimed or undistributed funds or dividends in the hands of or under the control of any trustee or other person empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the Fifth Schedule to this Act, or any petition, resolution, deed or other proceeding under or in pursuance of any such Act, have remained or remain unclaimed or undistributed for six months after they became claimable or distributable, or in any other case for two years after the receipt thereof by such trustee or other person, it shall be the duty of such trustee or other person forthwith to pay them to the Bankruptcy Estates Account at the Bank of England. The Board of Trade shall furnish the trustee or other person with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof.

The Board of Trade may at any time order any such trustee or other person to submit to them an account verified by affidavit of the sums received and paid by him under or in pursuance of any such petition, resolution, deed, or other proceeding as aforesaid, and may direct and enforce an audit of the account.

The Board of Trade, with the concurrence of the Treasury, may from time to time appoint a person to collect and get in all such unclaimed or distributed funds or dividends, and for the purposes of this section any court having jurisdiction in bankruptcy shall have and, at the instance of the person so appointed or of the Board of Trade, may exercise all the powers conferred by this Act with respect to the discovery and realisation of the property of a debtor, and the provisions of Part I of this Act with respect thereto shall, with any necessary modifications, apply to proceedings under this section.

(3) The provisions of this section shall not, except as expressly declared herein, deprive any person of any larger or other right or remedy to which he may be entitled against such trustee or other person.

(4) Any person claiming to be entitled to any moneys paid into the Bankruptcy Estates Account pursuant to this section, may apply to the Board of Trade for payment to him of the same, and the Board of Trade,

if satisfied that the person claiming is entitled, shall make an order for the payment to such person of the sum due

Any person dissatisfied with the decision of the Board of Trade in respect of his claim may appeal to the High Court

PART VII

BANKRUPTCY OFFENCES

154. (1) Any person who has been adjudged bankrupt or in respect of whose estate a Receiving order has been made shall in each of the cases following be guilty of a misdemeanour

Fraudulent debtors

- (a) If he does not to the best of his knowledge and belief fully and truly discover to the trustee all his property, real and personal and how and to whom and for what consideration and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any) or laid out in the ordinary expense of his family, unless he proves that he had no intent to defraud,
- (b) If he does not deliver up to the trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control and which he is required by law to deliver up, unless he proves that he had no intent to defraud,
- (c) If he does not deliver up to the trustee, or as he directs, all books, documents, papers, and writings in his custody or under his control relating to his property or affairs, unless he proves that he had no intent to defraud,
- (d) If, after the presentation of a bankruptcy petition by or against him or within (twelve) months next before such presentation, he conceals any part of his property to the value of ten pounds or upwards or conceals any debt due to or from him unless he proves that he had no intent to defraud,
- (e) If after the presentation of a bankruptcy petition by or against him or within (twelve) months next before such presentation he fraudulently removes any part of his property to the value of ten pounds or upwards
- (f) If he make any material omission in any statement relating to his affairs unless he proves that he had no intent to defraud
- (g) If knowing or believing that a false debt has been proved by any person under the bankruptcy he fails for the period of a month to inform the trustee thereof
- (h) If after the presentation of a bankruptcy petition by or against him he prevents the production of any book, document

paper, or writing affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law,

- (i) If, after the presentation of a bankruptcy petition by or against him, or within (twelve) months next before such presentation, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation or falsification of any book or document affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law,
- (j) If, after the presentation of a bankruptcy petition by or against him, or within (twelve) months next before such presentation, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law,
- (k) If, after the presentation of a bankruptcy petition by or against him, or within (twelve) months next before such presentation, he fraudulently parts with, alters, or makes any omission in, or is privy to the fraudulently parting with, altering, or making any omission in, any document affecting or relating to his property or affairs,
- (l) If, after the presentation of a bankruptcy petition by or against him, or at any meeting of his creditors within (twelve) months next before such presentation, he attempts to account for any part of his property by fictitious losses or expenses,
- (m) If, within (twelve) months next before the presentation of a bankruptcy petition by or against him, or, in the case of a Receiving order made under section one hundred and seven of this Act, before the date of the order, or after the presentation of a bankruptcy petition and before the making of a Receiving order, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same,
- (n) If, within (twelve) months next before the presentation of a bankruptcy petition by or against him or, in the case of a Receiving order made under section one hundred and seven of this Act, before the date of the order or after the presentation of a bankruptcy petition and before the making of a Receiving order, he obtains under the false pretence of carrying on business and, if a trader, of dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless he proves that he had no intent to defraud,
- (o) If within (twelve) months next before the presentation of a bankruptcy petition by or against him, or, in the case of a Receiving order made under section one hundred and seven

of this Act, before the date of the order, or after the presentation of a bankruptcy petition and before the making of a Receiving order he pawns, pledges, or disposes of any property which he has obtained on credit and has not paid for, unless, in the case of a trader, such pawning, pledging, or disposing is in the ordinary way of his trade, and unless in any case he proves that he had no intent to defraud

- (p) If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to an agreement with reference to his affairs or to his bankruptcy

For the purpose of this section the expression trustee means the Official Receiver of the debtor's estate or trustee administering his estate for the benefit of his creditors

(2) Any person guilty of a misdemeanour in the cases mentioned respectively in paragraphs (m) (n) and (o) of the last foregoing subsection shall be liable on conviction on indictment to penal servitude for any term not exceeding five years or on summary conviction to imprisonment for a term not exceeding twelve months

(3) Where any person pawns pledges or disposes of any property in circumstances which amount to a misdemeanour under paragraph (p) of subsection 1 of this section every person who takes in pawn or pledge or otherwise receives the property knowing it to be pawned pledged or disposed of in such circumstances as aforesaid shall be guilty of a misdemeanour and on conviction thereof liable to be punished in the same way as if he had received the property knowing it to have been obtained in circumstances amounting to a misdemeanour)

Undischarged bankrupt obtaining credit 155. Where an undischarged bankrupt—

(a) either alone or jointly with any other person obtains credit to the extent of ten pounds or upwards from any person without informing that person that he is an undischarged bankrupt or

(b) engages in any trade or business under a name other than that under which he was adjudicated bankrupt without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated bankrupt

he shall be guilty of a misdemeanour

156. If any person who has been adjudged bankrupt or in respect of whose estate a Receiving Order has been made —

(a) in incurring any debt or liability has obtained credit under false pretence or by means of any other fraud

(b) with intent to defraud his creditors or any of them has made or caused to be made any gift or transfer of or charge on his property

(c) with intent to defraud his creditors has concealed or removed any part of his property since or within two months before,

the date of any unsatisfied judgment or order for payment of money obtained against him,
he shall be guilty of a misdemeanour

(B A 1926, s 6 For the removal of doubts it is hereby declared that if any person who has been adjudged bankrupt or in respect of whose estate a Receiving Order has been made, has with intent to defraud his creditors or any of them caused or connived at the levying of any execution against his property he shall for the purposes of paragraph (b) of section one hundred and fifty six of the principal Act be deemed to have made a transfer of or charge on his property, and shall accordingly be guilty of a misdemeanour)

157. (1) Any person who has been adjudged bankrupt, or in respect of whose estate a Receiving order has been made, shall be guilty of a misdemeanour, if, ^{Bankrupt guilty of} ~~made, shall be guilty of a misdemeanour, if,~~
^{gambling &c} ~~having been engaged in any trade or business~~
and having outstanding at the date of the Receiving Order any debts contracted in the course and for the purposes of such trade or business —

(a) he has, within two years prior to the presentation of the bankruptcy petition, materially contributed to or increased the extent of his insolvency by gambling, or by rash and hazardous speculations, and such gambling, or speculations are unconnected with his trade or business, or

(b) he has, between the date of the presentation of the petition and the date of the Receiving Order, lost any part of his estate by such gambling or rash and hazardous speculations as aforesaid or

(c) on being required by the Official Receiver at any time, or in the course of his public examination by the Court, to account for the loss of any substantial part of his estate incurred within a period of a year next preceding the date of the presentation of the bankruptcy petition, or between that date and the date of the Receiving Order he fails to give a satisfactory explanation of the manner in which such loss was incurred

Provided that in determining for the purposes of this section whether any speculations were rash and hazardous, the financial position of the accused person at the time when he entered into the speculations shall be taken into consideration

(2) A prosecution shall not be instituted against any person under this section except by order of the Court, nor where the Receiving Order in the bankruptcy is made within two years from the first day of April nineteen hundred and fourteen

(3) Where a Receiving Order is against a person under section one hundred and seven of this Act, this section shall apply as if for references to the presentation of a petition there were substituted references to the making of the Receiving order

158. (1) If any person who has on any previous occasion been adjudged bankrupt or made a composition or arrangement with his creditors is adjudged bankrupt, or if a Receiving order is made in respect of his estate, he shall be guilty of a misdemeanour, if, having during the whole or any part of the two years immediately preceding the date of the presentation of the bankruptcy petition been engaged in any trade or business, he has not kept proper books of account throughout those two years or such part thereof as aforesaid, and, if so engaged at the date of presentation of the petition thereafter, whilst so engaged up to the date of the Receiving order or has not preserved all books of account so kept

Bankrupt failing to keep proper accounts

Provided that a person who has not kept or has not preserved such books of account shall not be convicted of an offence under this section if his unsecured liabilities at the date of the Receiving order did not exceed one hundred pounds or if he proves that in the circumstances in which he traded or carried on business the omission was honest and excusable

(2) A prosecution shall not be instituted against any person under this section except by order of the Court nor where the Receiving order in the bankruptcy is made within two years from the first day of April nineteen hundred and fourteen

(3) For the purposes of this section, a person shall be deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid and where the trade or business has involved dealings in goods also accounts of all goods sold and purchased, and statements of annual stocktakings

(4) Paragraphs 9 10 and 11 of section one hundred and fiftyfour of this Act (which relate to the destruction mutilation and falsification and other fraudulent dealing with books and documents) shall in their application to such books as aforesaid have effect as if two years next before the presentation of the bankruptcy petition were substituted for the time mentioned in those paragraphs as the time prior to the presentation within which the acts or omissions specified in those paragraphs constitute an offence

(5) Where a Receiving order is made against a person under section one hundred and seven of this Act this section shall apply as if for references to the presentation of a petition there were substituted references to the making of the Receiving order

(B A 1923 s 7 As from the expiration of a period of two years (a) after the commencement of this Act section one hundred and fifty eight of the principal Act (which relates to the failure of bankrupt to keep proper accounts) shall have effect as if—

- (a) there were substituted for sub-section 1 thereof the following sub-section, that is to say.—

“(1) Any person who has been adjudged bankrupt or in respect of whose estate a Receiving order has been made shall be guilty of a misdemeanour, if, having been engaged in any trade or business during any period in the two years immediately preceding the date of the presentation of the bankruptcy petition, he has not kept proper books of account throughout that period and throughout any further period in which he was so engaged between the date of the presentation of the petition and the date of the Receiving order, or has not preserved all books of account so kept

“Provided that a person who has not kept or has not preserved such books of account shall not be convicted of an offence under this section—

‘ (a) if his unsecured liabilities at the date of the Receiving order did not exceed, in the case of a person who has not on any previous occasion been adjudged bankrupt or made a composition with his creditors five hundred pounds, or in any other case one hundred pounds, or

“(b) if he proves that in the circumstances in which he traded or carried on business the omission was honest and excusable ”
and

- (b) there were substituted for sub-section 3 thereof the following sub-section, that is to say:—

“(3) For the purposes of this section, a person shall be deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, statements of annual stocktakings, and (except in the case of goods sold by way of retail trade to the actual consumer) accounts of all goods sold and purchased showing the buyers and sellers thereof in sufficient detail to enable the goods and the buyers and sellers thereof to be identified ”)

159. If any person who is adjudged bankrupt or in respect of whose estate a Receiving order has been made, after the presentation of a bankruptcy petition by or against him, or within six months before such presentation, quits England and takes with him,
Bankrupt absconding
with property

or attempts or makes preparation to quit England and take with him, any part of his property to the amount of twenty pounds or upwards, which ought by law to be divided amongst his creditors, he shall (unless he proves that he had no intent to defraud) be guilty of felony

160. If any creditor or any person claiming to be a creditor, in any bankruptcy proceedings, wilfully and with intent to defraud makes any false claim, False claim etc or any proof, declaration or statement of

account, which is untrue in any material particular, he shall be guilty of a misdemeanour and shall on conviction on indictment be liable to imprisonment with or without hard labour for a term not exceeding one year

161. Where an official receiver or a trustee in a bankruptcy reports to any Court exercising jurisdiction in bankruptcy that in his opinion a debtor who has been adjudged bankrupt or in respect of whose estate a receiving order has been made has been guilty of any offence under this Act or any enactment repealed by this Act or where the Court is satisfied upon the representation of any creditor or member of the committee of inspection that there is ground to believe that the debtor has been guilty of any such offence the Court shall, if it appears to the Court that there is a reasonable probability that the debtor will be convicted (and that the circumstances are such as to render a prosecution desirable) order that the debtor be prosecuted for such offence

(It shall not in any case be obligatory on the Court to make an order under section one hundred and sixty-one of the principal Act (which requires the Court in the circumstances therein mentioned to order the prosecution of a debtor), unless it appears to the Court that the circumstances are such as to render a prosecution desirable, and accordingly the said section shall have effect as if there were therein inserted after the word "convicted" the words "and that the circumstances are such as to render a prosecution desirable," and the proviso to the said section is hereby repealed)

162. Where a debtor has been guilty of any criminal offence, he shall not be exempt from being proceeded against therefore by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved

163. (Repealed by B A, 1926, s 9)

164. (1) A person guilty of an offence declared to be a felony or a misdemeanour under this Act in respect of which no special penalty is imposed by this Act shall be liable, on conviction on indictment, to imprisonment with or without hard labour for a term not exceeding two years, or, on summary conviction, to imprisonment with or without hard labour for a term not exceeding (twelve) months

Provided that the maximum term of imprisonment with or without hard labour which may be awarded on conviction on indictment of a misdemeanour under section one hundred and fifty-six of this Act shall be one year.

(2) Summary proceedings in respect of any such offence shall not be instituted after one year from the first discovery thereof either by the official receiver or by the trustee in the bankruptcy, or, in the case of proceedings instituted by a creditor, by the creditor, nor in any case shall they be instituted after three years from the commission of the offence

(3) Every misdemeanour under this Act shall be deemed to be an offence under and subject to the provisions of the Vexatious Indictments Act, 1859, and any Act amending that Act, and when any person is charged with any such misdemeanour before a Court of summary jurisdiction the Court shall take into consideration any evidence adduced before them tending to show that the act charged was not committed with a guilty intent

(4) In an indictment for an offence under this Act, it shall be sufficient to set forth the substance of the offence charged in the words of this Act specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of, any Court acting under this Act or any Act repealed by this Act

165. Where the Court orders the prosecution of any person for any offence under this Act or any enactment repealed by this Act, or for any offence arising out of or connected with any bankruptcy proceedings, it shall be the duty of the Director of Public Prosecutions to institute and carry on the prosecution

Provided that, where the order of the Court is made on the application of the Official Receiver and based on his report, the Board of Trade may themselves, or through the Official Receiver, institute the prosecution and carry on the proceedings, if or so long as those proceedings are conducted before a Court of summary jurisdiction, unless in the course thereof circumstances arise which, in the opinion of such Court or of the Board, render it desirable that the remainder of the proceedings should be carried on by the Director of Public Prosecutions

166. A statement or admission made by any person in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanours referred to in section eighty five of the Larceny Act, 1861, (which section relates to frauds by agents, bankers and factors)

Evidence as to frauds
by agents
24 & 25 Vict c 96

PART VIII

GENERAL

Interpretation

Interpretation

167. In this Act, unless the context otherwise requires —

"The Court" means the Court having jurisdiction in bankruptcy under this Act,

"Affidavit" includes statutory declaration, affirmation and attestation on honour,

"Available act of bankruptcy" means any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made,

"Debt provable in bankruptcy or provable debt" includes any debt or liability by this Act made provable in bankruptcy,

"Gazetted" means published in the *London Gazette*

"General rules" include forms

"Goods" includes all chattels personal

"Local Bank" means any bank in or in the neighbourhood of the bankruptcy district in which the proceedings are taken,

"Oath" includes affirmation declaration and attestation on honour

"Ordinary resolution" means a resolution decided by a majority in value of the creditors present personally or by proxy at a meeting of creditors and voting on the resolution,

"Prescribed" means prescribed by general rules within the meaning of this Act

"Property" includes money goods things in action land and every description of property whether real or personal and whether situate in England or elsewhere, also obligations easements and every description of estate interest and profit present or future vested or contingent arising out of or incident to property as above defined

"Resolution" means ordinary resolution

"Secured creditor" means a person holding a mortgage charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor

"Sheriff" includes any officer charged with the execution of a writ or other process

Special resolution means a resolution decided by a majority in number and three fourths in value of the creditors present personally or by proxy at a meeting of creditors and voting on the resolution

"Trustee" means the trustee in bankruptcy of a debtor's estate

.Repeals

168. (1) The Acts mentioned in the Sixth Schedule to this Act
 Repeal of enactments are hereby repealed to the extent mentioned
 and savings in the third column of that schedule

(2) This Act shall apply to proceedings under the Bankruptcy Acts, 1883 to 1913, pending at the commencement of this Act, as if commenced under this Act

(3) Until revoked or altered under the powers of this Act, any fees prescribed and any general rules and orders made under the Bankruptcy Acts, 1883 to 1913, and the Bankruptcy (Discharge and Closure) Act, 1887, which are in force at the commencement of this Act, shall continue in force, and shall have effect as if made under this Act

(4) Nothing in the repeals effected by this Act shall affect the powers or duties, tenure of office, terms of remuneration, or right to pension, of any officer appointed before the commencement of this Act

(5) Nothing in this Act shall affect any provisions of the Bankruptcy Acts, 1883 to 1913, relating to disqualifications on account of bankruptcy to executions or to the administration of small estates in County Courts which are left unrepealed by this Act

Short title, extent and commencement 169 (1) This Act may be cited as the Bankruptcy Act, 1914

(2) This Act shall not, except so far as is expressly provided, extend to Scotland or Ireland

(3) This Act shall come into operation on the first day of January nineteen hundred and fifteen

THE FIRST SCHEDULE.

MEETINGS OF CREDITORS

1 The first meeting of creditors shall be summoned for a day not later than fourteen days after the date of the Receiving Order, unless the Court for any special reason deem it expedient that the meeting be summoned for a later day

Sec 13

2 The Official Receiver shall summon the meeting by giving not less than six clear days' notice of the time and place thereof in the *London Gazette* and in a local paper

3 The Official Receiver shall also, as soon as practicable, send to each creditor mentioned in the debtor's statement of affairs, a notice of the time and place of the first meeting of creditors, accompanied by a summary of the debtor's statement of affairs, including the cause of his failure, and any observations thereon which the Official Receiver may think fit to make, but the proceedings at the first meeting shall not be

invalidated by reason of any such notice or summary not having been sent or received before the meeting

4 The meeting shall be held at such place as is in the opinion of the Official Receiver most convenient for the majority of the creditors

5 The Official Receiver or the trustee may at any time summon a meeting of creditors and shall do so whenever so directed by the Court, or so requested by a creditor in accordance with the provisions of this Act

6 Meetings subsequent to the first meeting shall be summoned by sending notice of the time and place thereof to each creditor at the address given in his proof or if he has not proved at the address given in the debtor's statement of affairs or at such other address as may be known to the person summoning the meeting

7 The Official Receiver or some person nominated by him shall be the Chairman at the first meeting. The Chairman at subsequent meetings shall be such person as the meeting by resolution appoint

8 A person shall not be entitled to vote as a creditor at the first or any other meeting of creditors unless he has duly proved a debt provable in bankruptcy to be due to him from the debtor, and the proof has been duly lodged before the time appointed for the meeting *

9 A creditor shall not vote at any such meeting in respect of any unliquidated or contingent debt or any debt the value of which is not ascertained

10 For the purpose of voting a secured creditor shall unless he surrenders his security state in his proof the particulars of his security the date when it was given and the value at which he assesses it and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence †

11 A creditor shall not vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor and against whom a Receiving Order has not been made as a security in his hands and to estimate the value thereof and for the purposes of voting but not for the purposes of dividend to deduct it from his proof

* In calculating a quorum only those who have lodged proofs can be counted. *Thomas In re Warner ex parte* (1911) 55 S J 482

† Inadvertence is not the same as mistake. A creditor who states in his proof that his security is worthless does not omit to value it. *Piers In re* (1898) 1 Q B 627. If he deliberately votes without mentioning his security he will not be allowed to amend. *Roue In re West Coast Cold Fields Ltd ex parte* (904) 2 K B 489

12 It shall be competent to the trustee or to the Official Receiver within twenty-eight days after a proof estimating the value of a security as aforesaid has been made use of in voting at any meeting, to require the creditor to give up the security for the benefit of the creditors generally on payment of the value so estimated, with an addition thereto of twenty per centum. Provided that where a creditor has put a value on such security, he may, at any time before he has been required to give up such security as aforesaid, correct such valuation by a new proof, and deduct such new value from his debt, but in that case such addition of twenty per centum shall not be made if the trustee requires the security to be given up.

13 If a Receiving Order is made against one partner of a firm, any creditor to whom that partner is indebted jointly with the other partners of the firm, or any of them, may prove his debt for the purpose of voting at any meeting of creditors, and shall be entitled to vote thereat.

14 The Chairman of a meeting shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the Court. If he is in doubt whether the proof of the creditor should be admitted or rejected he shall mark the proof as objected to and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained.

15 A creditor may vote either in person or by proxy.

16 Every instrument of proxy shall be in the prescribed form, and shall be issued by the Official Receiver of the debtor's estate, or by some other Official Receiver, or, after the appointment of a trustee, by the trustee, and every insertion therein shall be in the handwriting of the person giving the proxy, or of any manager or clerk, or other person in his regular employment, or of any Commissioner to administer oaths in the Supreme Court.

17 General and special forms of proxy shall be sent to the creditors, together with a notice summoning a meeting of creditors, and neither the name nor the description of the Official Receiver, or of any other person shall be printed or inserted in the body of any instrument of proxy before it is so sent.

18 A creditor may give a general proxy to his manager or clerk, or any other person in his regular employment. In such case the instrument of proxy shall state the relation in which the person to act thereunder stands to the creditor.

19 A creditor may give a special proxy to any person to vote at any special meeting or adjournment thereof on all or any of the following matters —

- (a) For or against any specific proposal for a comparison or scheme of arrangement,
- (b) For or against the appointment of any specified person as trustee at a specified rate of remuneration, or as member of the Committee of Inspection, or for or against the conti-

nance in office of any specified person as trustee or member of a Committee of Inspection,

- (c) On all questions relating to any matter other than those above referred to arising at any specified meeting or adjournment thereof

20 A proxy shall not be used unless it is deposited with the Official Receiver or trustee before the meeting at which it is to be used

21 Where it appears to the satisfaction of the Court that any solicitation has been used by or on behalf of a trustee or receiver in obtaining proxies or in procuring the trusteeship or receivership except by the direction of a meeting of creditors the Court shall have power if it thinks fit to order that no remuneration shall be allowed to the person by whom or on whose behalf such solicitation may have been exercised notwithstanding any resolution of the Committee of Inspection or of the creditors to the contrary

22 A creditor may appoint the Official Receiver of the debtor's estate to act in manner prescribed as his general or special proxy

23 The Chairman of a meeting may with the consent of the meeting adjourn the meeting from time to time and from place to place

24 A meeting shall not be competent to act for any purpose except the election of a Chairman the proving of debts and the adjournment of the meeting unless there are present or represented thereat at least three creditors or all the creditors if their number does not exceed three

25 If within half an hour from the time appointed for the meeting a quorum of creditors is not present or represented the meeting shall be adjourned to the same day in the following week at the same time and place or to such other day as the Chairman may appoint not being less than seven nor more than twenty-one days

26 The Chairman of every meeting shall cause minutes of the proceedings at the meeting to be drawn up and fairly entered in a book kept for that purpose and the minutes shall be signed by him or by the Chairman of the next ensuing meeting

27 No person acting either under a general or special proxy shall vote in favour of any resolution which would directly or indirectly place himself his partner or employer in a position to receive any remuneration out of the estate of the debtor otherwise than as a creditor rateably with the other creditors of the debtor Provided that where any person holds special proxies to vote for the appointment of himself as trustee he may use the said proxies and vote accordingly

28 The vote of the trustee or of his partner clerk solicitor or solicitor's clerk either as creditor or as proxy for a creditor shall not be reckoned in the majority required for passing any resolution affecting the remuneration or conduct of the trustee

THE SECOND SCHEDULE

PROOF OF DEBTS

Proof in Ordinary Cases

- 1 Every creditor shall prove his debt as soon as may be after
Sec 32 the making of a Receiving Order
- 2 A debt may be proved by delivering or sending through the post in a prepaid letter to the Official Receiver, or if a trustee has been appointed to the trustee, an affidavit verifying the debt
- 3 The affidavit may be made by the creditor himself, or by some person authorised by or on behalf of the creditor. If made by a person so authorised it shall state his authority and means of knowledge
- 4 The affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers if any by which the same can be substantiated. The Official Receiver or trustee may at any time call for the production of the vouchers
- 5 The affidavit shall state whether the creditor is or is not a secured creditor (and if it is found at any time that the affidavit made by or on behalf of a secured creditor has omitted to state that he is a secured creditor the secured creditor shall surrender his security to the Official Receiver or trustee for the general benefit of the creditors unless the Court on application is satisfied that the omission has arisen from inadvertence and in that case the Court may allow the affidavit to be amended upon such terms as to the repayment of any dividends or other wise as the Court may consider to be just)
- 6 A creditor shall bear the cost of proving his debt unless the Court otherwise specially orders
- 7 Every creditor who has lodged a proof shall be entitled to see and examine the proofs of other creditors before the first meeting and at all reasonable times
- 8 A creditor proving his debt shall deduct therefrom all trade discounts, but he shall not be compelled to deduct any discount not exceeding five per centum on the net amount of his claim, which he may have agreed to allow for payment in cash.
- 9 Formal proof of debts in respect of contributions payable under the National Insurance Act, 1911 to which priority is given by this Act shall not be required except in cases where it may otherwise be provided by rules under this Act

Proof by Secured Creditors

- 10 If a secured creditor realises his security, he may prove for the balance due to him after deducting the net amount realised

11 If a secured creditor surrenders his security to the Official Receiver or trustee for the general benefit of the creditors he may prove for his whole debt

12 If a secured creditor does not either realise or surrender his security he shall before ranking for dividend state in his proof the particulars of his security the date when it was given and the value at which he assesses it and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed

13 (a) Where a security is so valued the trustee may at any time redeem it on payment to the creditor of the assessed value

(b) If the trustee is dissatisfied with the value at which a security is assessed he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed on between the creditor and the trustee or as, in default of such agreement the Court may direct. If the sale be by public auction the creditor or the trustee on behalf of the estate may bid or purchase

(c) provided that the creditor may at any time by notice in writing require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realised and if the trustee does not within six months after receiving the notice signify in writing to the creditor his election to exercise the power he shall not be entitled to exercise it and the equity of redemption or any other interest in the property comprised in the security which is vested in the trustee shall vest in the creditor and the amount of his debt shall be reduced by the amount at which the security has been valued *

14 Where a creditor has so valued his security he may at any time amend the valuation and proof on showing to the satisfaction of the trustee or the Court that the valuation and proof were made *bona fide* on a mistaken estimate or that the security has diminished or increased in value since its previous valuation but every such amendment shall be made at the cost of the creditor and upon such terms as the Court

* As to redemption see *Button In re* (1905) 1 KB 602. Though in practice a proving creditor may be allowed to lump together debts and securities yet if the debts are distinct in substance with different rights over against third parties or with different securities the trustee should require the creditor to distinguish and specify the debts and the value of the securities (if any) for the same. *Morris In re* (1899) 1 Ch 485. This is so though the securities are not on the debtor's estate. *Ibid*. So again the creditor has a right to call on the trustee under para (c) to elect whether he will redeem any specified security. *Smith and Logan In re* 2 Man 70. A secured creditor who lumps together several securities at one assessed value does not thereby get against a subsequent incumbrancer any right of consolidation which he had not before. He need not put a separate valuation on each parcel comprised in any one security but though he does so he may realise from one parcel the whole ar secured by all these parcels. *Pearce In re* (1909) 2 Ch 492.

shall order, unless the trustee shall allow the amendment without application to the Court †

15 Where a valuation has been amended in accordance with the foregoing rule, the creditor shall forthwith repay any surplus dividend which he may have received in excess of that to which he would have been entitled on the amended valuation, or, as the case may be shall be entitled to be paid out of any money, for the time being available for dividend any dividend or share of dividend which he may have failed to receive by reason of the inaccuracy of the original valuation before that money is made applicable to the payment of any future dividend but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment

16 If a creditor after having valued his security subsequently realises it or if it is realised under the provisions of Rule 13 the net amount realised shall be substituted for the amount of any valuation previously made by the creditor and shall be treated in all respects as an amended valuation made by the creditor

17 If a secured creditor does not comply with the foregoing rules he shall be excluded from all share in any dividend

18 Subject to the provisions of Rule 13, a creditor shall in no case receive more than twenty shillings in the pound, and interest as provided by this Act

Proof in respect of Distinct Contracts

19 If a debtor was, at the date of the Receiving Order, liable in respect of distinct contracts as a member of two or more distinct firms or as a sole contractor, and also as a member of a firm, the circumstances that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts against the properties respectively liable on the contracts

† If after the notice in Rule 13 the trustee declares his election to purchase the security at the creditors valuation probably the creditor cannot subsequently amend his valuation *Norris ex parte Sadler, in re*, 17 QBD 728. The mere fact that the trustee has told the creditor (no notice to elect having been given by the creditor) that he intends to purchase the security at the creditors valuation does not preclude amendment even if the trustee has tendered the amount *Newton In re* (1896) 2 QB 403 but when once the trustee has purchased and paid for the security at the creditors valuation amendment is no longer possible *Norris ex parte supra*. See note to Sch 1 Rule 10. A secured creditor was allowed to revalue his security which had increased in value by the death of a prior incumbrancer though by reason of the amount of the first valuation a scheme intended to be offered to the creditors could not be carried through *Fenshawe In re* (1905) 1 KB 170

Periodical Payments

20 When any rent or other payment falls due at stated periods and the Receiving Officer is made at any time other than one of those periods the person entitled to the rent or payment may prove for a proportionate part thereof up to the date of the order as if the rent or payment grew due from day to day

Interest

21 On any debt or sum certain payable at a certain time or otherwise whereon interest is not reserved or agreed for and which is overdue at the date of the Receiving Officer and provable in bankruptcy the creditor may prove for interest at a rate not exceeding four per centum per annum to the date of the order from the time when the debt or sum was payable if the debt or sum is payable by virtue of a written instrument at a certain time and if payable otherwise then from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment

Debt Payable at a Future Time

22 A creditor may prove for a debt not payable when the debtor committed an act of bankruptcy as if it were payable presently and may receive dividends equally with the other creditors deducting only thereout a rebate of interest at the rate of five pounds per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted

Admission or Rejection of Proofs

23 The trustee shall examine every proof and the grounds of the debt and in writing admit or reject it in whole or in part or require further evidence in support of it If he rejects a proof he shall state in writing to the creditor the grounds of the rejection *

24 If the trustee thinks that a proof has been improperly admitted the Court may on the application of the trustee after notice to the creditor who made the proof expunge the proof or reduce its amount †

25 If a creditor is dissatisfied with the decision of the trustee in respect of a proof the Court may on the application of the creditor reverse or vary the decision

* The Court may order the trustee to give further particulars of his grounds of rejection *Huntly (Marquis of) In re Goldstein (No 2) ex parte* (1917) HBR 270

† If a proof is reduced the trustee cannot compel the creditor to refund any sum overpaid but can deduct it from any future dividend *Searle Hoare & Co In re The Trustee ex parte* Law Journal June 21 1924 p 388

26 The Court may also expunge or reduce a proof upon the application of a creditor if the trustee declines to interfere in the matter, or, in the case of a composition or scheme, upon the application of the debtor †

27 For the purpose of any of his duties in relation to proofs, the trustee may administer oaths and take affidavits

28 The Official Receiver, before the appointment of a trustee, shall have all the powers of a trustee with respect to the examination, admission, and rejection of proofs, and any act or decision of his in relation thereto shall be subject to the like appeal

THE THIRD SCHEDULE

Sec 99

LIST OF METROPOLITAN COUNTY COURTS

Omitted

THE FOURTH SCHEDULE

Sec 131

RE ENACTMENT OF PROVISIONS RELATING TO PRE BANKRUPTCIES

B A 1883 s 153 (4)
and (5)

(4) On the occurrence at any time after the passing of this Act of any vacancy in the office of any person who has under sub-section 4 of section 153 of the B A 1883, been appointed to perform the remaining duties of any of the officers mentioned in sub section 2 of that section, the Board of Trade may, with the approval of the Treasury appoint a fit person to fill the vacancy, and all estates, rights and effects, which at the time of the vacancy are by virtue of the said section vested in the officer whose office is so vacated shall by virtue of such appointment, ~~become~~ be vested in the person so appointed, provided that any person so appointed shall be an officer of the Board of Trade, and shall in all respects act under the directions of the Board of Trade

† As a rule the debtor cannot apply unless the composition or scheme has been accepted *Penoist In re* (1909) 2 K B 784 If his application is dismissed with costs which he does not pay the costs are not provable in his subsequent bankruptcy, *Pilling, In re*, (1909) 2 K B 788

(5) The Board of Trade may, with the approval of the Lord Chancellor, from time to time direct that any duties or functions not of a judicial character relating to any bankruptcies, insolvencies or other proceedings under any Act prior to the B A 1869, which were at the time of the passing of the B A 1883, performed or exercised by registrars of County Courts, shall devolve on and be performed by the Official Receiver, and thereupon all powers and authorities of the registrar, and all estates, rights and effects vested in the registrar shall become vested in the Official Receiver

In every liquidation by arrangement under the B A 1869, which was pending at the commencement of the B A 1883, if at any time there is no trustee acting under the liquidation by reason of death or for any other cause, such of the Official Receiver of bankrupt's estates as is appointed by the Board of Trade for that purpose shall become and be the trustee in the liquidation and the property of the liquidating debtor shall pass to and vest in him accordingly but this provision shall not prejudice the right of the creditors in the liquidation to appoint a new trustee in the manner directed by the B A 1869 or the rules thereunder and on such appointment the property of the liquidating debtor shall pass to and vest in the new trustee

The provisions of this Act with respect to the duties and responsibilities of and accounting by a trustee in a bankruptcy under this Act shall apply, as nearly as may be to a trustee acting under the provisions of this section

Where a bankruptcy or liquidation by arrangement under the B A 1869, has been or is hereafter closed any property of the bankrupt or liquidating debtor which vested in the trustee and has not been realised or distributed shall vest in such person as may be appointed by the Board of Trade for that purpose and he shall thereupon proceed to get in realise and distribute the property in like manner and with and subject to the like powers and obligations as far as applicable as if the bankruptcy or liquidation were continuing and he were acting as trustee thereunder

In every bankruptcy under the B A 1869 pending at the commencement of the B A 1883 where a registrar of the London Bankruptcy Court or of any County Court would hereafter but for this enactment become the trustee under the bankruptcy such of the Official Receiver of bankrupt's estates as may be appointed by the Board of Trade for that purpose shall be the trustee in the place of the registrar and the property of the bankrupt shall pass to and vest in the Official Receiver accord

(1) A debtor who has been adjudged bankrupt, or whose affairs have been liquidated by arrangement under the B A 1869, or any previous B A, and who has not obtained his discharge, may apply to the Court for an order of discharge and thereupon the Court shall appoint a day for hearing the application in open Court

Sec 2
Bankruptcy (Discharge
and Closure) Act, 1887

(2) Notice of the appointment by the Court of the day for hearing the application for discharge shall, twenty-one days at least before the day so appointed, be sent by the debtor to each creditor who has proved in the bankruptcy or liquidation or to those of them whose addresses appear in the debtor's statement of affairs or are known to the debtor, and shall also, fourteen days at least before the day so appointed be published in the *London Gazette*

Discharge of bankrupt
or debtor

(3) On the hearing of the application the Court may hear any creditor and may put such questions to the debtor and receive such evidence as the Court thinks fit, and, on being satisfied that the notice required by this section has been duly sent and published, may either grant or refuse the order of discharge or suspend the operation of the order for a specified time, or grant the order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the debtor, or with respect to his after acquired property

Provided that the Court shall refuse the discharge in all cases where the Court is satisfied by evidence that the debtor has committed any misdemeanour under Part II of the Debtors Act, 1869, or any amendment thereof

(4) The Court may as one of the conditions referred to in this section require the debtor to consent to judgment being entered against him in the Court having jurisdiction in the bankruptcy or liquidation by the Official Receiver of the Court, or the trustee or assignee in the bankruptcy or liquidation, for any balance of the debts provable under the bankruptcy or liquidation which is not satisfied at the date of the discharge, or for such sum as the Court shall think fit, but in such case execution shall not be issued on the judgment without the leave of the Court which leave may be given on proof that the debtor has since his discharge acquired property or income available for payment of his debts

(5) A discharge granted under this section shall have the same effect as if it had been granted in pursuance of the Act under which the debtor was adjudged bankrupt or liquidated his affairs by arrangement

Effect of discharge

(1) In each of the following cases, that is to say—

Removal of assignee
trustee or inspector under
pre 1869 Acts

(a) Any insolvency under any Act for
the relief of insolvent debtors

(b) Any commission fiat or adjudication in bankruptcy within
the jurisdiction of the old London Bankruptcy Court under
any Act prior to the B A 1869

(c) Any administration by way of arrangement pursuant to an Act
of the session held in the seventh and eighth years of the
reign of Her Majesty Queen Victoria chapter seventy
entitled An Act for facilitating arrangements between
Debtors and Creditors or pursuant to the provisions of
the Bankrupt Law Consolidation Act 1849 or the hundred
and ninety second section of the B A 1861 within the
jurisdiction of the old London Bankruptcy Court

in which the estate is now vested in a creditor's assignee or trustee
or inspector either alone or jointly with the official assignee the Court
may at any time upon the application of any creditor and upon being
satisfied that there is good ground for removing such creditors assignee
trustee or inspector or in any other case in which it shall appear to
the Court just or expedient appoint the official assignee or any person
appointed under the one hundred and fifty third section of the B A
1883 to perform the remaining duties of the office of official assignee
to be sole assignee or trustee or inspector of the estate in the place
of such creditors assignee trustee or inspector as the case may be

(2) Such appointment shall operate as a removal of the creditors
assignee trustee or inspector of the estate
and shall vest the whole of the property of
the bankrupt or debtor in the official assignee

Vesting of estate

or person appointed by the Board of Trade as aforesaid alone and
all estate rights powers and duties of such former creditors assignee
trustee or inspector shall thereupon vest in and devolve upon the
official assignee or person appointed by the Board of Trade as aforesaid
alone

(1) Where on the close of a bankruptcy or liquidation or on the
release of a trustee a registrar or Official
Receiver or Official Assignee is or is acting
as trustee and where under section 159
section 160 or section 161 of the B A
1883 either as originally enacted or as re
enacted in this Schedule an Official Receiver

Sec 6
Official Receiver not
liable for acts of prior
trustee

is or is acting as trustee
respect of any act done
prior or trustee

no liability shall attach to him personally in
or default made or liability incurred by any

(2) Section 93 of this Act (which section relates to the release of a
trustee) shall with the exception of sub-
section 5 thereof apply to an Official Receiver
or an Official Assignee when he is or is
acting as trustee and when an Official Rece

Release of Official Re-
ceiver or Official Assignee

or Official Assignee has been released under that section, he shall continue to act as trustee for any subsequent purposes of the administration of the debtor's estate, but no liability shall attach to him personally by reason of his so continuing in respect of any act done, default made, or liability incurred, before his release

All books and papers in the custody of an Official Receiver or Official Assignee or of the Acting Comptroller in Bankruptcy, and relating to any bankruptcy under the B A, 1869, may, on the expiration of one year after the close of the bankruptcy, be disposed of in accordance with rules made under section 1 of the Public Records Office Act, 1877, and that section shall apply accordingly

(1) General rules for carrying into effect the objects of the foregoing sections of the Bankruptcy (Discharge and Closure) Act, 1887, as re-enacted in this Schedule, may from time to time be made and subject to the same provisions as general rules carrying into effect the objects of this Act

(2) There shall be paid in respect of proceedings under such foregoing sections such fees as the Lord Chancellor may, with the sanction of the Treasury, from time to time prescribe, and the Treasury may direct by whom and in what manner the same are to be collected and accounted for, and to what account they are to be paid

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